75149

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 195.

CHARLES T. PRESTON, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED DECEMBER 30, 1910.

(22,461.)

(22,461.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 840.

CHARLES T. PRESTON, PLAINTIFF IN ERROR,

vs.

THE CITY OF CHICAGO ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

UDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1911.

At a Supreme Court, Begun and Held at Springfield on Tuesday, the Fifth Day of April, in the Year of Our Lord One Thousand Nine Hundred and Ten, within and for the State of Illinois.

Present:

William M. Farmer, Chief Justice; James H. Cartwright, Justice; ...n P. Hand, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, ...tice; Frank K. Dunn, Justice; George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit on the Twelfth day of March A. D. ...10, the same being one of the days in vacation before the term of ...urt aforesaid, a record of the proceedings in the Superior Court ...Cook County was filed by Plaintiff in error Charles P. Preston in ...e office of the Clerk of the Supreme Court in words and figures ...lowing, to-wit:

7063.

Record from Superior Court of Cook County to Supreme Court.

CHARLES T. PRESTON
vs.
CITY OF CHICAGO et al.

Filed March 12, 1910.

J. McCAN DAVIS,
Clerk of Supreme Court.

United States of America.

...ATE OF ILLINOIS,
County of Cook, ss:

...Pleas, before the Honorable Willard M. McEwen one of the ...dges of the Superior Court of Cook county, in the State of Illinois, ...ding a branch Court of said Court, at a regular term of said Su...ior Court of Cook county, begun and holden at the Court House, ...the City of Chicago, in said County and State, on the first Mon...r, being the Second day of November in the year of our Lord one ...usand nine hundred and eight, and of the Independence of the ...ited States of America, the one hundred and thirty third.

Present:

The Honorable Willard M. McEwen, Judge of the Superior Court of Cook county.
John J. Healy, State's Attorney.
Christopher Strassheim, Sheriff of Cook county.

Attest:

CHARLES W. VAIL, *Clerk*.

Be it remembered that heretofore to-wit on the 11th day of March A. D. 1903 a certain Petition for Mandamus was filed in the office of the Clerk of said Court in words and figures following to-wit:

1 * * * * * * *

To the Superior Court of the County of Cook and State of Illinois:

Your petitioner, Charles T. Preston, of the City of Chicago, in the said County respectfully represents and states to said Court as follows:

That the "City of Chicago" is, and has been for more than twenty years last past, a municipal corporation in said Cook County, and State of Illinois, incorporated and organized under an Act of the Legislature of said State, entitled "an Act to provide for the incorporation of cities and villages, approved April 10 1872, in force July 1st, 1872, and existing subject to said Act and the several Act-amendatory thereof.

That Carter H. Harrison is now and ever since the month of April 1897, has been the mayor of said City of Chicago, duly elected and acting as such mayor.

That from the 18th day of April, 1881, there has been and still is an "Executive Department of the Municipal Government of said City of Chicago," known as the department of police, which department was created by an ordinance of said City of Chicago and by which ordinance said executive department was made to and does embrace "the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been, or may be, prescribed by ordinance."

That by the ordinance creating said "Executive Department" there was created the office of "Superintendent of police," which superintendent, by provisions of said ordinance, was to be appointed by the mayor of said city, by and with the advice and consent of the city council of said city, on the first Monday in May, 1881, "or as soon thereafter as may be," and bienially thereafter.

That Joseph Kipley was on, to-wit, the first Monday of May, 1897, duly appointed by the mayor of said City of Chicago, as such superintendent of police and thereupon became such superintend-
5 ent of police of said City of Chicago, until the 30th day of April, 1900, when he resigned said office and Francis O'Neil was duly appointed as such superintendent of police, which office he still holds.

That on, to-wit, the 1st day of June, 1886, your petitioner was a citizen of the United States, 39 years of age, and for more than two

years next previous to said 1st of June, 1886, he had been a resident of the City of Chicago, in said State of Illinois, and was a qualified elector of said city, and had never been a defaulter to said municipal corporation, said City of Chicago. That on, to-wit, said 1st day of June, 1886, your petitioner was duly appointed to the office of police patrolman in said department of police in said City of Chicago, and thereupon he took the oath of office prescribed for such police patrolman to take, and at once entered upon his official duties as such police officer of said City of Chicago.

That your petitioner served continuously as such police patrolman from said 1st day of July, 1891, until, to-wit, the 14th day of March, 1898, and hath remained such police patrolman from thence hitherto.

That on, to-wit, December 18, 1897, by direction of the then superintendent of police (said Joseph Kipley), your petitioner took what is called the civil service examination as to his qualifications for the office of policeman of said City of Chicago, which examination was conducted by and under the direction of the civil service commissioners of the City of Chicago (said City of Chicago having theretofore duly adopted the "Civil Service Act" so-called, being an Act of the Legislature of the State of Illinois, entitled "An Act to Regulate the Civil Service of Cities," approved and in force March 20th, 1895, and the mayor of said city having theretofore appointed, under the provisions of said Act, civil service commissioners, and said City of Chicago being then under said Civil Service Act and governed thereby;) upon which examination your petitioner was "passed" as duly qualified for the office of policeman of said city, standing upon such examination 84 on list upon a scale of 100, and standing No. 96 upon the list of "eligibles."

6 That afterwards, to-wit, on the 14th day of March, 1898, as your petitioner is informed and believes, and upon such information and belief states the fact to be, the said Joseph Kipley, as such superintendent of police of said City of Chicago, directed the name of your petitioner to be dropped from the pay-roll of the policemen of said City of Chicago, and thereupon, by and under such direction, the name of your petitioner was dropped from said pay-roll; that from thence hitherto the superintendent of police of the City of Chicago, has caused the name of your petitioner to be omitted and excluded from the pay-roll of the police department of the City of Chicago; and still so causes the name of your petitioner to be omitted from said pay-roll. That the said conduct of the said Superintendent, in so causing the name of your petitioner to be omitted and excluded from the said pay-roll, was and is wholly unauthorized, invalid and contrary to and in disregard of the legal rights of your petitioner.

That in consequence of the wrongful action of the said Joseph Kipley, aforesaid, in causing the omission and exclusion of your petitioner's name from the police pay-rolls of the City of Chicago, your petitioner has not been paid any portion of the salary accruing and due to him as police officer as aforesaid, from, to-wit, said 14th day of March, A. D. 1898, until the present time.

That your petitioner has made demand upon the said City of Chicago, and upon the said Carter H. Harrison, mayor thereof, and upon the said Joseph Kipley, as superintendent of police of said City, while he was such superintendent, that petitioner's name should be restored to the police pay-rolls of said city, to the end that your petitioner might be enabled to draw the salary due him as police officer, alike the salary already accrued and due him and the salary accruing to him from month to month as such police officer of said City of Chicago, to which he is justly and lawfully entitled, but that the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph H. Kipley as Superintendent of Police thereof respectively refused to comply with your petitioner's reasonable and lawful demand in the premises and still do refuse so to do. That no part of the salary so accruing and due to your petitioner as aforesaid from said 14th day of March, A. D. 1898, until the present time, has ever been paid to your petitioner, although your petitioner has made demand therefore upon said City of Chicago, and upon said Carter H. Harrison as mayor of said city. And in this behalf your petitioner shows that under the provisions of the laws and ordinances of the said City of Chicago the salary to which your petitioner was lawfully entitled from said 14th day of March, A. D., 1898, until the present time was the sum of $83.33 per month, less one per cent. thereof, which under the provisions of the Police Pension Act, so-called, in force during the period aforesaid, should be deducted by the police pension board or other proper authority of the said City of Chicago, from the salary of your petitioner, and paid into the police pension fund of said city.

And in this behalf your petitioner further shows that from the time of his appointment as a police officer of said city until the said 14th day of March, A. D. 1898, there had been and was deducted from the salary of your petitioner and paid into the Police Pension Fund, so-called, under the provisions of existing laws, the sum of 1 per cent. from each monthly payment of salary accruing to your petitioner; and that under the provisions of said law your petitioner was and is entitled to share in the benefits and advantages of said police pension fund.

And your petitioner further shows that by Section 3 of said Civil Service Act it was expressly provided and required as follows.

"Said Commissioners shall classify all the offices and places of employment in said city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this Act. The offices and places so classified by the commission shall constitute the Classified Civil Service of said city, and no appointments to any such offices or places shall be made except under and according to the rules hereinafter mentioned."

It was further provided by Section 4 of said Civil Service Act as follows:

"Said commission shall make rules to carry out the purposes of this Act, and for examination, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

Your petitioner further, upon information and belief, states that soon after the organization of said commission in accordance with the terms of said Act, the said commissioners proceeded to classify as required, the various offices and places of employment of said City of Chicago, with reference to examinations provided for in said Act, and said commission did, in fact, constitute the classified civil service of said city; that such classification was made under and by virtue of said Act and the rules adopted by said civil service commission; and that by rule 1, Section 1, of said civil service commission, in force during the entire period of the year 1898, and also theretofore in force and effect, it was provided that said commission "do hereby classify all the offices and places of employment in said city," except the excepted offices, among others as follows: "2,504 patrolmen in the department of police at $1,000 per annum"; which classification will more fully and at large appear upon an inspection of said rules, ready to be produced.

Your petitioner further shows that by Section 31 and 32 of said Civil Service Act, it is provided as follows: Section 31. Comptroller to pay salaries only after certification. No Comptroller, or other auditing officer of the city, which has adopted this Act, shall approve the payment of or be in any manner concerned in paying any salary or wages to any person for services as any officer or employee of such city, unless such person is occupying an office or place of employment, according to the provisions of law, and is entitled to payment therefor."

SEC. 32. Paymasters, etc. to pay salaries only after certification. No paymaster, treasurer, or other officer or agent of the city, which has adopted this Act, shall willfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor."

Your petitioner further shows that the first board of civil service commissioners, in 1895, at the request of the chief executive
9 officers of the said City of Chicago and the comptroller of said city adopted the practice of passing upon and certifying all pay-rolls of the employees of said City of Chicago, including the pay-rolls of all police patrolmen in the employ of said city, which practice has continued from thence hitherto; and it was then and ever since has been required by the comptroller of said City of Chicago, and by said board of civil service commissioners, that all pay-rolls in the City of Chicago including the police pay-roll, should be so certified as a condition of payment thereof.

And your petitioner states that by said certification it was in legal effect declared by said board of civil service commissioners that all persons whose names were upon said pay-rolls so certified, were entitled to be paid, as persons who are holding office under said Civil Service Act; and by the payment of said pay-rolls so certified, by the comptroller and other officers of said City, such officers and said Chicago, in legal effect, admitted that all persons whose names were upon such pay-rolls, were occupying an office or place of employment

under and according to the provisions of said Civil Service Act and entitled to payment thereunder as being in the classified civil service of said city, under said act.

And your petitioner further shows that for more than two years next prior to December 18th, 1897, your petitioner was duly carried upon the police pay-rolls of said city, and from month to month was duly certified by said civil service commission, as a police patrolman entitled to pay as such, under said Civil Service Act; and that after your petitioner had taken successfully his civil service examination on December 18th, 1897, and had passed the same as hereinbefore stated he continued to be certified by said civil service commission upon the police pay-rolls of said city, as a member of the classified civil service of said city, and to be paid by said city as an officer or employe of said city entitled to pay for such services under said Civil Service Act.

And your petitioner insists that the said City of Chicago, said Carter H. Harrison as mayor of said city, and said Francis O'Neil as superintendent of police of said city, are, respectively, estopped by the law and the facts hereinbefore stated and set forth, to now deny that your petitioner was on the 14th day of March 1898, and from thence hitherto has been a police patrolman in the classified civil service of the said City of Chicago, under said Civil Service Act, and was then and there entitled to all the privileges and protection afforded by said Act.

Your petitioner further states that the civil service commissioners now in office as such under said Civil Service Act, are Joseph Powell, Christian Meier and Julian W. Mack.

And your petitioner further shows that by the appropriation made by the Common Council of the City of Chicago, to-wit: in the month of December, A. D. 1897, for the payment of the employees of said city, and for other municipal purposes for the year 1898, there was an appropriation made for the patrolmen then, to-wit, in December 1897, upon the police pay-rolls of said city, and so in the classified civil service as aforesaid, including among the number of such patrolmen your petitioner. And your petitioner avers that in like manner, to-wit, in or shortly after the month of December, in the respective years 1898, 1899, 1900, 1901, and 1902, there were further appropriations made by said city for the payment of police patrolmen in the classified civil service of said city for said years respectively, and that your petitioner was entitled under said appropriations to be taken and carried upon said pay-rolls for said years 1898, 1899, 1900, 1901, 1902, and 1903, unless during said year 1903 he shall be lawfully discharged from the police force of said city, as being in the employment of said city in the classified civil service.

Wherefore your petitioner prays a writ of mandamus under the seal of said court directed to said City of Chicago, and to said Carter H. Harrison, as mayor of said City of Chicago, and to Francis O'Neil, as superintendent of police of said City of Chicago; and to Joseph Powell, Christian Meier and Julian W. Mack, as civil
11 service commissioners of the City of Chicago, commanding said City of Chicago, said Carter H. Harrison, as mayor of

said City of Chicago, and said Francis O'Neil, as superintendent of police of said City of Chicago, as follows:

To forthwith place the name of your petitioner upon the roster of police patrolmen, and upon the police pay-roll, *of* said City of Chicago, to the end that your petitioner may hereafter draw the pay due your petitioner as a police patrolman of said City from time to time, as the other police patrolmen in said City of Chicago are paid.

And commanding said Joseph Powell, Christian Meier, and Julian W. Mack, as civil service commissioners of said City of Chicago, as follows: To certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever such name shall hereafter appear as such police patrolman upon any pay-roll of policemen, presented to said civil service commissioners by the proper officers of said City of Chicago, for certification thereof, to the end that your petitioner may hereafter draw the pay due him as a police patrolman of said city as other police patrolmen are paid.

Your petitioner asks that such further order may be made in the premises, as justice may require, etc.

CHARLES T. PRESTON,
By W. P. BLACK AND
A. B. CHILCOAT,
Attorneys for Petitioner.

W. P. BLACK,
Of Counsel.

12-17 STATE OF ILLINOIS
County of Cook, ss.

Charles T. Preston, being duly sworn on oath says that he is the petitioner named in the foregoing petition, and which is subscribed by him; and that the several matters and things in said petition contained are true to the best of his knowledge, information and belief.

CHARLES T. PRESTON.

Subscribed and sworn to before me this 9th day of March, A. D. 1903.

ALLEN B. CHILCOAT,
Notary Public.

* * * * * * *

STATE OF ILLINOIS,.
County of Cook, ss:

In the Superior Court of said County.

Gen. No. 228,725.

Term No. —.

CHARLES T. PRESTON, Petitioner,
vs.
CITY OF CHICAGO et al., Defendants.

Petition for Mandamus.

Now comes Charles T. Preston, petitioner, by W. P. Black and A. B. Chilcoat, his attorneys, and by leave of court first had and obtained, files this his amended and supplemental petition in this cause.

To Said Court:

Your petitioner, Charles T. Preston, of the City of Chicago, in the County of Cook and State of Illinois, represents and states to this court as follows:

That on, to wit, the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revised the same. That by different sections of Chapter X of said act provisions were made as follows, to-wit:

"SECTION 1. There is hereby established an executive department of the municipal government of said city to be known as the board of police. Said board shall consist of three commissioners, in addition to the mayor, who shall be ex officio a member thereof, to be chosen in the manner hereinbefore prescribed; and a majority of said board shall constitute a quorum for the transaction of business. * * *

"SECTION 4. Said board shall assume and exercise the entire control of the police force or said city, and shall possess full power and authority over the police organization, government, appointments, and discipline within said city. * * *

SECTION 6. The duties of the police force shall be executed under the direction and control of said board, and according to rules and regulations which it is hereby authorized to pass from time to time, for the more proper government and discipline of its subordinate officers and the police force of the city. The said police force shall consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and as many more police
19 patrolmen as may be authorized by the common council on application by this board. The several offices hereby created shall be severally filled by appointments in the mode prescribed by this act. And each person so appointed shall hold office only during such time as he shall faithfully observe and execute all the rules and

regulations of said board, the laws of the state, and the ordinances of the city. * * *

"SECTION 7. The qualification, enumeration and distribution of duties, mode of trial and removal from office, of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police: Provided, however, that no person shall be appointed to or hold office of superintendent of police without the advice and consent of the common council to every such appointment; nor shall any person be appointed to or hold office in the police force aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, Provided, that no person shall be removed therefrom except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city pending the hearing of the charges preferred against him: And, Provided, that when any vacancy shall occur in the force of captain of police, the same shall be filled by appointment from among the persons then in office, as sergeants of police, and a like vacancy in the office of sergeant of police shall be filled by appointment from among the persons then in office as police patrolmen."

Said police force so continued until the aforesaid act was amended by the legislature of the State of Illinois, February 16, 1865, when the foregoing sections, six and seven, were repealed, and sections 15, 16 and 19 of the Act of 1865, were passed. The said sections read as follows:

"SECTION 15. The duties of the police force shall be executed under the direction and control of said board, and according to rules and regulations which it is hereby authorized to pass, from time to time, for the more proper government and discipline of its subordinate officers and the police force of said city. The said force shall consist of a general superintendent of police, one deputy superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many more police patrolmen, not exceeding two hundred, as may be authorized by the common council, on the application of the board of police commissioners, and each patrolman so appointed, shall hold his office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city: Provided, that for incompetency, neglect of duty or other sufficient cause, the said board may at any time, remove the superintendent and deputy superintendent of police or the fire marshal and assistant fire marshal.

"SECTION 16. The qualifications, enumeration and distribution of duties, mode of trial and removal from office of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; nor shall any person be appointed to or hold office in the police force aforesaid, who is not a citizen of the United States, or who shall not have re-

sided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, Provided, that no person shall be removed therefrom, except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city, pending the hearing of the charges preferred against him: And, Provided, that whenever any vacancy shall occur in the office of captain of police, the same shall be filled by an appointment from among the persons then in office as sergeants of police; and a like vacancy in the office of sergeant of police shall be filled by appointment from among persons then in office as police patrolmen.

"SECTION 19. From and after the passage of this act the mayor of said city shall cease to be in any manner a member of the board of police and of the board of public works of said city."

The said police force continued under the control of the police board aforesaid, until, to-wit, the adoption by the legislature of the State of Illinois, of the General Act to provide for the incorporation of Cities and Villages, approved April 10, 1872, and which act was adopted by the City of Chicago, April 23, 1875.

That by said act it was amongst other things provided as follows, to-wit:

"SECTION 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the changes of the organization under this act; and from the time of such organization or change of organization the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place."

That by Section 1 of Article V of said act it was, amongst other things, provided as follows:

"* * * The city council in cities and the president and board of trustees in villages shall have the following powers: * * *

"Sixty-six. To regulate the police of the city or village, and pass and enforce all necessary police ordinances. * * *

"Sixty-eight. To prescribe the duties and powers of a superintendent of police, policeman and watchman."

That afterwards, to-wit, on the 28th day of June, 1875, the city council of the City of Chicago duly passed an ordinance approved by the mayor, for the reorganization of the police department of the city. The ordinance contained seventeen sections, and those deemed material, in this cause, are as follows:

"Be it ordained by the city council of the City of Chicago:

"SECTION 1. There is hereby established and created a department of the municipal government of said city, to be known as the department of police. * * *

SECTION 2. There is hereby created the office of city marshal of said city. The term of said office shall be for the term of two years

mencing with July 1st, 1875, and the salary attached to said
e shall be $4,000 per annum. The city marshal shall be ap-
ted by the head of the police department, and shall give a bond
security to be approved by the mayor, in the sum of $25,000,
litioned for the faithful performance of the duties of the office,
shall well and truly account for and pay over all moneys, and
ender any and all property, books and papers which may come
his hands as said city marshal, on the expiration or sooner ter-
ation of his term of office. He shall, as such head of the police
artment (subject to all the general ordinances of the city), as-
e and exercise the control of the police force of the city, and shall
ess full power and authority, subject to all the general ordinances
he city council, over the police organization, government, ap-
tments, and discipline within said city, and shall have the
ody and control, subject to the direction of the comptroller, of
public property, books, records and equipments belonging to the
ce department. * * *

SECTION 5. The said force shall consist of one general superin-
lent of police, one deputy superintendent of police, four captains
olice, twenty sergeants, and the police patrolmen now in the em-
y of the city, which may be increased or decreased in number
n time to time, or any police patrolman may at any time be re-
ved and discharged from the police force by the superintendent
he force, with the concurrence of the city marshal. The deputy
erintendent and sergeants may be removed and discharged or re-
ed in rank by the city marshal, with the written concurrence of
mayor of the city; provided, however, that the office of deputy
erintendent shall be discontinued and cease to exist after the pres-
fiscal year. All the members of the police force shall take an
h to faithfully discharge their duties. * * *

SECTION 17. The police force as heretofore existing, shall continue
e the police force until otherwise changed by this ordinance, but
board of police, and the office theretofore known as that of the
missioner of the board of police of the City of Chicago, shall
se to exist, and no duties shall hereafter be performed or power
authority exercised in connection with said police force by said
rd or any commissioner of the board of police of said city, after
the passage of this ordinance."

That afterwards, to-wit, on the 13th day of April, 1881, the city council of the City of Chicago duly passed an ordi-
nce of said city, which ordinance was approved on the 18th day April, 1881. Said ordinance appears in the municipal code of icago, published by authority of the city council in the year 1881, apter VIII. Said ordinance, among other things, provided as fol-
vs, to-wit.

"730. There is hereby established an executive department of the unicipal government of the City of Chicago, which shall be known the department of police, and shall embrace the superintendent of lice, a secretary to said superintendent, one captain of police for ch district, and such number of lieutenants, detectives, sergeants,

and police patrolmen as has been or may be prescribed by ordinance.

"731. There is hereby created the office of superintendent of police, who shall be the head of said department of police, and shall hold his office for the term of two years, and until his successor shall be appointed and qualified. * * *

"734. The superintendent shall have the management and control of all matters relating to the department, its officers and members; and, with the consent of the mayor, he shall appoint all officers and members of said department; provided, that all captains shall be appointed from members of the police serving as lieutenants, all lieutenants from members serving as sergeants, and all sergeants from members serving as patrolmen.

"735. Said superintendent shall have the power to remove from the police force any police patrolman at his pleasure, and, with the concurrence of the mayor, he may remove, or reduce in rand any officer or member of said department. * * *

"750. The superintendent shall hear and determine all cases for the violation of any rule, regulation or order of said department, or other breach of discipline, and shall have power to punish the offending party by reprimand, forfeiture, and with-holding pay for a specified time, or dismissal from the force; but no more than ten days' pay shall be forfeited and withheld for any offense.

"751. The superintendent of police may prefer written charges, without oath, for any violation of the police rules, regulations or orders, against any police officer or patrolman upon the regular police force, upon his own knowledge, or upon written information communicated to him by any member of the police department.

"752. During the pending of charges against any police officer or patrolman upon the police force, the superintendent may suspend from duty any such officer or patrolman until such charges can be examined."

Your petitioner states that he is advised, and avers the facts to be, that said Sections 735 and 750 were upon the passage of
23 said ordinance, void; and were and are of no force or effect, for the reason that the provisions thereof are directly at variance with the provisions of the statute of the State of Illinois, pertaining to the removal of police patrolmen from the police force of said City of Chicago.

That the aforesaid provisions of said ordinance, so far as the same were valid, continued in force until the adoption by the legal voters of said City of Chicago, as hereinafter stated, of an act of the legislature of the State of Illinois, entitled, "An Act to regulate the Civil Service of Cities," on, to-wit, the 25th day of March, 1895, and until, to-wit, the first day of July, 1895, when the then mayor of said City of Chicago, by his proclamation, declared the said act to be thereafter in full force and effect in said City of Chicago, as hereinafter stated.

Your petitioner further shows that at the municipal election in said City of Chicago, held in the month of April, 1887, John A.

Roach was elected mayor of said City of Chicago, and having duly qualified, entered upon the duties of such office and became in law and in fact the mayor of said City of Chicago, and so continued to be such mayor, and acted as such for, to-wit, two years thereafter. That on, to-wit, the — day of ——, 188–, one —— —— was duly appointed by the then mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago, to the office of superintendent of police of said City of Chicago; and having duly qualified as such superintendent of police was, on the 1st day of June, 1886, performing the duties of such office of superintendent of police in said City of Chicago. That on said 1st day of June, 1886, the city council of said City of Chicago, had, by an ordinance theretofore duly passed, and then in force, authorized the appointment of a large number of police patrolmen, to-wit, eleven hundred and eighty-one, for service on the police force in the police department of said City of Chicago.

24 Your petitioner further shows that on, to-wit, the 1st day of June, 1886, your petitioner was a citizen of the United States of America, thirty-nine years of age, and for more than two years next previous to said 1st day of June, 1886, had been a resident of said City of Chicago, and had never been a defaulter to said municipal corporation, said City of Chicago; and was then and there in all respects qualified and eligible for appointment to the office of police patrolman in said city.

That thereafter, on, to-wit, the 1st day of June, 1886, there was a vacancy in the number of police patrolmen authorized by the city council as aforesaid, and thereupon your petitioner was duly appointed to the office of police patrolman in the department of police in said City of Chicago, by —— —— the then superintendent of police of said City of Chicago, which appointment your petitioner then and there accepted, and took and subscribed the following oath of office, to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

I, Charles T. Preston, having been duly appointed to the office of police patrolman, do solemnly swear that I will support the Constitution of the State of Illinois, and that I will faithfully discharge the duties of such police patrolman according to the best of my ability.

CHARLES T. PRESTON.

Subscribed and sworn to before me this 1st day of June, 1886.
[SEAL.]

—— ——,
Notary Public.

And thereupon, immediately after taking such oath of office, he entered upon the performance of his duties as such police patrol-
25 man, and continued thereafter in the discharge thereof until his further performance of such duties was wrongfully and unlawfully interrupted, as hereinafter stated and set forth.

And your petitioner avers that the office of police patrolman to which petitioner was appointed as aforesaid, was an office created by the said Act of the Legislature, passed February 13, 1863, and first above referred to, and by the amendments thereto passed by said legislature February 16, 1865, and secondly above referred to; which said two acts, so far as the provisions thereof created the office of police patrolman in and for said City of Chicago, continued in full force and effect as valid and existing laws of said state, at the time of your petitioner's appointment to said office as aforesaid; and that, in so far as said acts of said legislature created the office of police patrolman, they have never been repealed, but are still in full force and effect. And your petitioner avers that he, in accepting said appointment to such office of police patrolman, and rendering service as aforesaid, relied upon said Acts of 1863, and 1865 as having created said office of police patrolman; and petitioner now insists that said office, to which he was appointed, was in fact created by said acts; and that said acts are a full justification for the claim of your petitioner which he now makes, to-wit, that upon said appointment and taking of the oath of office as aforesaid, he then and there held the office of police patrolman, which had been created under said statutes of 1863 and 1865, and that he could only be removed from said office by proceedings in conformity with the provisions of said acts or amendments thereto; and that no such removal was ever attempted, as is hereinafter shown.

That your petitioner then and there became a police patrolman of said City of Chicago, and in the service of said city as such. That during all of the period of time between the 1st day of June, 1886, and said 14th day of March, 1898, your petitioner was not
26 only a police patrolman of said City of Chicago, duly appointed on the 1st day of June, 1886, by the then superintendent of police of said City of Chicago, with the consent of the then mayor of said City of Chicago, and continued in office as aforesaid, but he was, during all said period, recognized as being such police patrolman by the respective mayors of said City of Chicago, and the respeteive superintendents of police of said City of Chicago; and by the city council of said City of Chicago; and that no successor to your petitioner as such police patrolman was at any time during said period appointed; and said City of Chicago, during all of said period of years, duly appropriated the money to pay the salary accruing to your petitioner as such police patrolman; and such salary was paid to your petitioner as such police patrolman, from time to time, to-wit, from the month of June, 1886, to said 14th day of March, 1898.

Your petitioner further shows that an act duly passed by the legislature of the State of Illinois, entitled, "An Act to regulate the Civil Service of Cities," approved and in force March 20th, 1895, was, pursuant to the provisions of law, submitted to the legal voters of the City of Chicago, for their adoption, at a general election held in said City of Chicago, on, to-wit, April 2nd, 1895. That at said election said act was adopted by the legal voters of said city; and thereupon, to-wit, on July 1st, 1895, George B. Swift, the then

mayor of said City of Chicago, issued his proclamation in words and figures as follows, to-wit: "Whereas, under the provisions of an Act of the General Assembly of the State of Illinois, entitled "an Act to regulate the Civil Service of Cities approved and in "force March 20th, 1895," there was duly submitted to a vote of the electors of the City of Chicago, at a general city election, held April 2nd, 1895, the proposition whether the city and its electors should adopt and become entitled to the benefits of said act;
27 and, whereas, a large majority of the votes cast at such election were cast for such proposition and in favor of the adoption of said act; now, therefore, as required by said Act, I, George B. Swift, mayor of the City of Chicago, hereby declare that said act is in full force and effect in the City of Chicago from and after this date, and that in accordance with the provisions thereof, I have this day appointed as the three civil service commissioners under said act, John M. Clark, for the term of three years; Robert A. Waller, for the term of two years; and Christopher Hotz, for the term of one year.

"Dated July 1st, 1895.

GEORGE B. SWIFT, *Mayor.*"

Your petitioner further shows that upon the adoption by the said City of Chicago of the said Civil Service Act, so-called, and its becoming operative in said city pursuant to law and under said proclamation of the mayor, dated July 1st, 1895, all laws, or parts of laws, and all ordinances and regulations of said City of Chicago, inconsistent with said act, were thereupon and thereby repealed by virtue of Section 37 of said Civil Service Act, so-called.

Your petitioner further shows that by Section 3 of said Civil Service Act, it is expressly provided and required as follows: "Said commissioners shall classify all the offices and places of employment in said city, with reference to the examination hereinafter provided for, except those offices and places mentioned in Section 11 of said act. The offices and places so classified by the commission shall constitute the classified service of such city; and no appointment to any such office or place of employment shall be made except under and according to the rules hereinafter mentioned."

It is further provided by Section 4 of the Civil Service Act, as follows: "Said commission shall make rules to carry out the purposes of this act, and for examinations, appointments and re-
28 movals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules." And your petitioner further shows that by Rule 1 of said rules adopted by said Civil Service Commissioners, it was among other things provided, as follows:

RULE 1.

Classification.

"1. Unclassified Service.—Section 11 of said act provides that the following offices and places of employment shall not be included in

the classified service. Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of the board of education, the superintendent of schools, heads of any principal department of the city, members of the law department, and one secretary of the mayor.

"The offices and places above named shall constitute the unclassified service.

"2. Classified Service.—All other offices and places of employment in said city under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service. With reference to the examinations hereinafter provided for, they are hereby classified under two general classes, to be known as Class A and Class B, respectively. This classification is based mainly upon nature of employment. The positions embraced in Class A will be chiefly those of a permanent character, while those in Class B will be more in the nature of temporary employment. The commission will decide as occasion may require, in which class and division any particular office or place of employment shall belong.

"3. Official and Labor Service.—Class A shall be known as the official service, and Class B, shall be known as the labor service.

"4. Divisions and Grades.—For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon the amount of compensation. The several divisions of the official service shall be as follows: * * *

"Division D.—Police Service.—All persons in the uniformed police force."

Your petitioner further, on information and belief, states that soon after the organization of said Civil Service Commission, in accordance with the terms of said act, the commissioners proceeded to classify, as required by said act, the various offices and places of
29 employment of said City of Chicago; that such classification was made under and by virtue of said act, and the rules adopted by said Civil Service Commission. Your petitioner further avers that all policemen in said City of Chicago, including your petitioner, were, at the time of the adoption of said Rule 1, and at the time of said classification, in the uniformed police force of said city, and by virtue of said act and rule of said commission and the classification thereunder, became and were classified in Division D of the said official service of said City of Chicago, under said Civil Service Act, and thereupon the offices and places of employment so classified by said commission did "constitute the classified service of said City of Chicago." And your petitioner further shows that by said provision, the classification of the offices of police patrolmen of said City of Chicago then and there held by them, the then incumbents of said offices, including your petitioner, then and there became police patrolmen, de jure, in the classified service of said City of Chicago, and your petitioner so continued from thence hitherto. And your peti-

tioner further shows that by Section- 31 and 32 of said Civil Service Act, it is provided as follows:

"SECTION 31. No comptroller or other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any person any salary or wages for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor.

"SECTION 32. No paymaster, or other officer or agent of a city which has adopted this act, shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for service as an officer or employé of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

And your petitioner further shows that the first Board of Civil Service Commissioners appointed by the mayor of said City of Chicago, George B. Swift, July 1, 1895, in compliance with said Sections 31 and 32 of said Civil Service Act, passed upon and certified all the pay rolls of the employés and officers of said City of Chicago, including the pay rolls of all police patrolmen in the
30 employ of the said City of Chicago; and it was then and ever since has been required by the comptroller of said City of Chicago, and by the Board of Civil Service Commissioners of said City of Chicago, as well as by Sections 31 and 32 of said Civil Service Act, that all pay rolls in said City of Chicago, under said Civil Service Act, including the pay rolls of police patrolmen of said City of Chicago, should be so certified as a condition of payment thereof. And your petitioner states that by said certification it was in legal effect declared by said Board of Civil Service Commissioners, that every person whose name was on the pay roll so certified was "entitled to be paid as a person occupying an office or place of employment" under and according to the provisions of said Civil Service Act, and "entitled to payment therefor" as being in the classified civil service of said City of Chicago, under said act.

And your petitioner further shows that at the time of the classification of the civil service of said City of Chicago, including all the positions in the uniformed police force of said city, in said department of police, provided by statute and ordinances of said city, and which classification was published and distributed by said Civil Service Commissioners to the public, such publication being made August 14, 1895, and which went into effect on Monday, August 18, 1895, your petitioner was a police patrolman and included in the uniformed police force of said City of Chicago, having been duly appointed by the superintendent of police of said City of Chicago, with the consent of the mayor of said City of Chicago, as aforesaid, and thereafter having taken the oath of office and qualified and acted as such police patrolman as aforesaid, and that he thereupon became, by virtue of his office as police patrolman in the police force then and there held by him, a member of the classified civil service of
31 said City of Chicago, as an officer de jure, and thereafter so continued, to-wit, from thence hitherto; and that he has

never been legally discharged or separated from the office of polic
patrolman in the classified civil service of said city, or deprived
his office, as said police patrolman, by due process of law.

And your petitioner further shows that for more than two yea
next prior to the 14th day of March, 1898, your petitioner was
police patrolman of said City of Chicago, and continuously pe
formed the duties of such police patrolman, and was duly carri
upon the pay rolls of said City of Chicago, and from month to mon
was duly certified by said Civil Service Commissioners as a poli
patrolman entitled to pay as such under said Civil Service Act.

That at the municipal election held at the City of Chicago i
April, 1897, Carter H. Harrison was duly elected mayor of said Ci
of Chicago, and having duly qualified and entered upon the duti
of such office, he became in law and in fact the mayor of said Ci
of Chicago, and by re-election from term to term thereafter conti
ued to be the mayor of said city until, to-wit, the month of Apri
1905, when he was succeeded in the office of mayor of said City
Chicago by Edward F. Dunne, who was duly elected mayor of sa
city, and served as such from April, 1905, to the month of Apri
1907, when he was succeeded in said office of mayor of the City
Chicago by Fred A. Busse, who is now the duly elected, qualified an
acting mayor of said city.

That on, to-wit, the first Monday of May, 1897, Joseph Kipl
was duly appointed by the then mayor of said City of Chicago, sa
Carter H. Harrison, as superintendent of police of said City
Chicago, by and with the consent of the city council of said city
and said Joseph Kipley, having duly qualified as such superinten
ent, entered upon the discharge of the duties of such office, and th
and there became and was, by due appointment and reappointmen
the superintendent of police from the first Monday in Ma
32 1897, until after the month of January, 1900.

That, to-wit, on the 14th day of March, 1898, as your pe
tioner is informed and believes, and upon such information and b
lief states the fact to be, the said Joseph Kipley, as such superi
tendent of police of said city, illegally and without warrant of la
directed the name of your petitioner to be dropped from the pay r
of police patrolmen of said city, and thereupon by and under su
direction the name of your petitioner was dropped from said p
roll; that such action was taken without any charges having ev
been preferred against your petitioner, and without any trial of a
charges of any nature against him, nor was such action because
any alleged misconduct on his part; and said action was taken wit
out the written concurrence of the then mayor of said City
Chicago. That from thence the said Joseph Kipley, claiming to a
in that behalf as superintendent of police of said city, during h
term of office, caused the name of your petitioner to be omitted a
excluded from the pay roll of the police department of the said cit
and each and every one who has been duly and legally appointed
the office of superintendent of police of said city, from the month
January, 1900, up to and including the present time, has still caus
and so causes, the name of your petitioner to be excluded and omitt

from said pay roll. That said conduct of said Joseph Kipley, and those following him in office, as superintendent of police of said city, in so omitting and excluding the name of your petitioner from said pay roll, was and is a wrongful denying to your petitioner of his legal rights, as a police patrolman of said city, to the emoluments of his said office, and was without due process of law.

That in consequence of the wrongful action of the said Joseph Kipley, and those who have followed him in office, as superintendent of police of said city, up to and including the present time, in causing the omission of your petitioner's name from the pay rolls of police patrolmen of said city, your petitioner has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1908, until the present time. And your petitioner has made demand upon the said City of Chicago, and upon said Carter H. Harrison, mayor of said City of Chicago, and upon Joseph Kipley, as superintendent of police of said City of Chicago, which demand was made during their said incumbency of their respective offices, that his name should be placed on, or restored to, the pay roll of police patrolmen of said City of Chicago, to the end that your petitioner might be enabled to draw the salary due him as a police patrolman, alike the salary already accrued to him, and the salary accruing to him from month to month as such police patrolman of said City of Chicago, to which he is justly and lawfully entitled; but the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph Kipley, as superintendent of police thereof, and those who have followed him in said office as superintendent of police of the said City of Chicago, whom your petitioner makes defendants herein, have respectively refused to comply with your petitioner's reasonable and lawful demand in the premises, and still do refuse so to do. That no part of the salary so accrued and accruing and due your petitioner as aforesaid from said 14th day of March, 1898, until the present time, has ever been paid to your petitioner, although your petitioner has made demand therefor.

Your petitioner further shows that under the provisions of the law of the state and the ordinances of said City of Chicago, the salary to which your petitioner was lawfully entitled from said 14th day of March, 1898, until the present time, was the sum of $83.33 per month, less one per cent. thereof, which, under the provisions of the Police Pension Act, so-called, as a part of the statute law of the State of Illinois, in force during the period aforesaid, should be deducted by the Police Pension Board or other proper authority of said City of Chicago, from the salary of your petitioner and paid into the Police Pension Fund of said city. And in this behalf your petitioner further shows that from the time of his appointment as a police patrolman of said city, or, to-wit, the 1st day of June, 1886, up to and including the 14th day of March, 1898, there was, from time to time, deducted from the salary of your petitioner and paid into the Police Pension Fund, so-called, under the provisions of the then existing Police Pension Laws of the State of Illinois, the sum of one per cent. from each and every monthly

payment of salary accruing to your petitioner; and that under t
provisions of said pension law, to which for greater certainty, and
fuller statement of the legal right thereby secured to your petition
to share in said fund (to which he had theretofore been required
and therefore did, contribute as aforesaid), your petitioner prays
refer with the same effect as if said act, being then and still one of t
public laws of the State of Illinois, were herein fully set forth a
quoted.

And your petitioner says that the act of the said Joseph Kipley,
superintendent of police of said City of Chicago, in directing t
name of your petitioner to be dropped from the pay roll of poli
patrolmen of the said City of Chicago, as aforesaid, and in causi
the name of your petitioner then and thereafter to be omitted a
excluded from the pay roll of the police department of said ci
resulted in the denying to your petitioner his legal right to share
the benefits of said fund, and was and is wholly unauthorized a
without due process of law. And your petitioner further shows th
such action of said Joseph Kipley, was and is contrary to Article
of the Constitution of the State of Illinois, which reads as follow
to-wit: "No person shall be deprived of life, liberty or propert
without due process of law." Such action was and is, also, contra
to Article XIV, Section 1, of the Constitution of the Unit
35 States of America, which reads as follows, to-wit: "All pe
sons born or naturalized in the United States, and subject
the jurisdiction thereof, are citizens of the United States and of t
state wherein they reside. No state shall make or enforce any l
which shall abridge the privileges and immunities of citizens of t
United States; nor shall any state deprive any person of life, liber
or property without due process of law, nor deny to any pers
within its jurisdiction the equal protection of the law."

And your petitioner further avers that the said defendants ins
that the action of the said Joseph Kipley, superintendent of t
police force of the City of Chicago, and of the said other defendan
in continuing to omit and exclude the name of your petitioner fro
the pay roll of said city, and in omitting and excluding the nam
of your petitioner from the pay roll of the police department of t
said city, had and has the effect to deprive your petitioner of h
opportunity and right to exercise the functions and duties of a poli
patrolman as a member of the Classified Civil Service of said Ci
of Chicago, and to receive and enjoy the salary pertaining to th
office of police patrolman of said City of Chicago, so held by hi
which claim of said defendants, and their conduct in the premis
was and is a wrongful denying to your petitioner of his legal righ
and without due process of law; and defendants thereby deny
your petitioner the equal protection of the law. And your pe
tioner insists that the said City of Chicago, the mayor of said Ci
of Chicago, and the superintendent of police of said City of Chicag
are respectively estopped by law and by the facts hereinbefore stat
and set forth, to now deny that your petitioner was, on the sa
14th day of March, 1898, and from thence hitherto has been, an
still is, a police patrolman in the Classified Civil Service of said Ci

of Chicago, under said Civil Service Act, and that as such he was, and is, as such police patrolman, entitled to all the benefits and protection afforded by said Civil Service Act, and particularly
36 to the benefits and protection of the provisions of said act governing the removal or discharge from said service of police patrolmen of said City of Chicago, in the classified service thereof.

Your petitioner further states that before the filing of his said petition herein, the said Joseph Kipley was succeeded in the said office of superintendent of police of said City of Chicago by Francis O'Neil, who was duly appointed superintendent of police of said City of Chicago by said Carter H. Harrison, the then mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago; and that after the filing of your petitioner's petition herein, the said Francis O'Neil was succeeded in the office of superintendent of police of said City of Chicago by John M. Collins, who was duly appointed such superintendent of police of said City of Chicago, by said Edward F. Dunne, who was, at the time of such appointment, the duly elected, qualified and acting mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago. That the said Edward F. Dunne was succeeded in the office of mayor of said City of Chicago by said Fred A. Busse. That the said Fred A. Busse was duly elected to the office of mayor of said City of Chicago, duly qualified, and is now the legal and acting mayor of said City of Chicago. That the said John M. Collins was succeeded in the office of superintendent of police of said City of Chicago by George M. Shippy, who was duly appointed to the office of superintendent of police of said City of Chicago by the said Fred A. Busse, the then duly elected, qualified and acting mayor of said City of Chicago, by and with the advice and consent of the city council by said City of Chicago, and is now the duly appointed and acting superintendent of police of said City of Chicago. And that since the filing of your petitioner's petition the personnel of said Civil Service Com-
37 missioners of said City of Chicago has been changed, and said Civil Service Commission now consists of Elton Lower, M. L. McKinley and H. D. Fargo.

Your petitioner further shows that the annual appropriations made by the city council of said City of Chicago, for the year 18—, and for each and every year thereafter, up to and including the year 1895, for the payment of police officers and employés of said City of Chicago, and for other municipal purposes for each of the then respectively ensuing years, included appropriations for the payment of police patrolmen of said City of Chicago, among whom your petitioner was included as a member of said police force of said City of Chicago. And the further appropriations made by said city council of said City of Chicago, for the payment of the police patrolmen of said city, for each and every year thereafter, up to and including the year 1898, during which time your petitioner was a police patrolman in the uniformed police force of said City of Chicago, in the Classified Civil Service, and drew his pay from month to month as such police patrolman of said city for each and

every month from July 1st, 1897, up to and including the month of March, 1898, and his monthly voucher, for each and every month thereof, was duly certified by said Civil Service Commissioners of said City of Chicago, as said petitioner's pay therefor became due him. And your petitioner further avers that in like manner, in the year 1899, and for each and every year thereafter, up to and including the present time, there was annual appropriations made by said city council of said City of Chicago, for the payment of police patrolmen in the uniformed police force of said City of Chicago, in the Classified Civil Service thereof, for each and every ensuing year, respectively; and that your petitioner was and is, entitled under said appropriations to be taken and carried upon said pay rolls for each and every month of said several years, up to and including the present time, as having been lawfully in the
38 service of said City of Chicago, in the Classified Civil Service thereof, as a police patrolman in said police department of said City of Chicago.

Wherefore your petitioner prays a writ of mandamus under the seal of said court, directed to the said City of Chicago and said Fred A. Busse, as mayor of said City of Chicago, and to George M. Shippy, as superintendent of police of said City of Chicago, and to Elton Lower, W. L. McKinley and H. D. Fargo, as Civil Service Commissioners of said City of Chicago, and the successors in office of said respective officials, commanding them respectively, as follows: Commanding said City of Chicago, and said respective officials, other than the Civil Service Commissioners, to forthwith place the name of your petitioner upon the roster of police patrolmen, and upon the pay rolls of police patrolmen, of said City of Chicago, to the end that your petitioner may hereafter draw the pay due your petitioner as police patrolman of said City of Chicago, from time to time, as other police patrolmen are paid.

And commanding said Civil Service Commissioners of said City of Chicago, to certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever your petitioner's name shall hereafter appear as such police patrolman upon any pay roll of police patrolmen presented to the Civil Service Commissioners for their certification; and to the end that your petitioner may hereafter draw the salary due him as a police patrolman of said City of Chicago, as other police patrolmen are paid.

And your petitioner further asks that such further order be made in the premises as justice may require.

CHARLES T. PRESTON,
Petitioner.

A. B. CHILCOAT,
His Attorney.

39–43 And afterwards to-wit on the 5th day of December A. D. 1908, the following proceedings were had and entered of record in said Court to-wit:

228,725.

CHARLES T. PRESTON

vs.

ITY OF CHICAGO and CARTER H. HARRISON, FRANCIS O'NEILL, Supt. of Police; Joseph Powell, Christian Meier, and Julian W. Mack, as Civil Service Commissioners of the City of Chicago.

Mandamus.

On motion of respondents' attorney, it is ordered that the respondnts' demurrer now on file, stand as demurrer to the petitioner's petiion as amended and said cause coming on to be heard upon the deurrer to said petition as amended herein, after arguments of counl and due deliberation by the Court said demurrer is sustained and ereupon the petitioner elects to stand by his said amended petition d it is ordered by the Court that said cause be and is hereby disissed at petitioner's costs.

Therefore it is ordered by the Court that the petitioner take nothg by his said suit and the defendants go hence without day and do ve and recover of and from the petitioner their costs and charges this behalf expended and have execution therefor.

* * * * * * *

At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of June, in the Year of Our Lord One Thousand Nine Hundred and Ten, Within and for the State of Illinois.

resent: Alonzo K. Vickers, Chief Justice; James H. Cartwright, ice; William M. Farmer, Justice; Frank K. Dunn, Justice; n P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke, ice; William H. Stead, Attorney General; Warren C. Murray, -hal.

ttest:

J. McCAN DAVIS, *Clerk.*

it remembered, that afterwards, to-wit: on the 29th day of . 1910, the opinion of the Court was filed in the words and es following to-wit:

No. 7063.

CHARLES P. PRESTON, Plaintiff in Error,
v.
CITY OF CHICAGO et al., Defendants in Error.

Error to Superior Court Cook County.

Appeal from —.

45 Copy.

Case No. 7063.

Mr. Justice FARMER delivered the opinion of the court:

This is a petition for a writ of mandamus, filed by the plaintiff in error in the superior court of Cook County against defendants in error for the purpose of having his name restored to the police pay-roll, from which it was dropped March 14, 1898. The petition avers the petitioner was appointed police patrolman by the superintendent of police of the city of Chicago on June 1, 1886, took the oath of office, entered upon the discharge of his duties and continued in the discharge thereof until March 14, 1898, when, by order of the superintendent of police, his name was dropped from the pay-roll of police patrolmen. The original petition was filed March 11, 1903, five years, lacking three days, after petitioner's name was dropped from the pay-roll. A general demurrer to the petition was filed by defendants. No other steps appear to have been taken in the case until December 2, 1908, when petitioner filed an amended petition. The demurrer to the original petition was upon motion of the defendants ordered by the court to stand as a demurrer to the amended petition. The demurrer was sustained and judgment rendered dismissing the petition and against petitioner for costs. A writ of error was sued out of this court to review the judgment of the superior court, on the theory that it involves a construction of the State and Federal constitutions.

The original petition is not in the record. Counsel for petitioner says the original petition was similar to those passed upon by this court in other cases brought by other parties whose names had been dropped from the pay-roll at the same time as that of petitioner, and by the amended petition it was sought to avoid objections pointed out in the decisions of this court to the petitions in those cases. While the amended petition is more lengthy than those in the cases heretofore brought before us and some of the objections made to those petitions are obviated by the amended petition now before us, this
46 petition raises no question that has not heretofore been decided by this Court adversely to petitioner's contention. We shall not, therefore, take up a consideration of the various averments of the petition nor again enter upon a discussion of questions

raised thereby. The material and vital questions raised on this record are:

First, the petitioner being in office as a police patrolman at the time of the classification of offices by the civil service commission, after the Civil Service act went into effect became thereby an officer of the classified service and entitled to the protection against removal conferred by that act. This was decided to the contrary in Stott v. City of Chicago, 205 Ill. 281, McNeill v. City of Chicago, 212 id. 481, Kennealy v. City of Chicago, 220 id. 485, and People v. City of Chicago, 242 id. 561.

Second, that the office of police patrolman in the police department of the city of Chicago was created by the legislature in enacting the charter of the city and subsequent amendments thereto, and that the office was not abolished or affected by the adoption by the city of Chicago of the Cities and Villages act in 1875. The law was held otherwise in Bullis v. City of Chicago, 235 Ill. 472, People v. City of Chicago, supra, and Moon v. Mayor, 214 id. 40.

Third, that the removal of petitioner without notice of written charges preferred against him and being afforded an opportunity to be heard was a denial to him of due process of law, in violation of section 2 of article *a* of the constitution of the State of Illinois and section 1 of the fourteenth amendment to the constitution of the United States. This question was passed upon and decided contrary to petitioner's contention in People v. City of Chicago, supra, McNeill v. City of Chicago, supra, Kennealy v. City of Chicago, supra, and Donahue v. County of Will, 100 Ill. 94.

Fourth, that the writ of mandamus is a writ of right; that the time limited for commencing the action is five years; that
47 nothing short of that time can be urged or considered against the right to maintain it; that a defense based upon a lapse of time must be pleaded and that laches is not applicable. We held otherwise in Kennealy v. City of Chicago, supra, and Schultheis v. City of Chicago, 240 Ill. 167. We could not reverse the judgment in this case without overruling our decisions in those cases, and we are not convinced that we would be justified by the law in overruling them.

Judgment affirmed.

18 & 49 At a Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of June, in the Year of Our Lord One Thousand Nine Hundred and Ten, Within and for the State of Illinois,

Present: Alonzo K. Vickers, Chief Justice; James H. Cartwright, Justice; William M. Farmer, Justice; Frank K. Dunn, Justice; John P. Hand, Justice; Orrin N. Carter, Justice; George A. Cooke, Justice; William H. Stead, Attorney General; Warren C. Murray, Marshal.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, to-wit, on the Twenty-ninth day of June A. D. 1910, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of Record, To-wit:

No. 7063.

CHARLES P. PRESTON, Plaintiff in Error,
v.
CITY OF CHICAGO and CARTER H. HARRISON, FRANCIS O'NIELL, Superintendent of Police; Joseph Powell, Christian Meier, and Julian W. Mack, as Civil Service Commissioners of the City of Chicago, Defendants in Error.

Error to Superior Court Cook County

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore, it is considered by this Court that the Judgment aforesaid be Affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Defendants in error recover of and from the said Plaintiff in error costs by them in this behalf expended, and that they have execution therefor.

* * * * * * *

50 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Charles T. Preston, Plaintiff in error vs. City of Chicago and Carter H. Harrison, Francis O'Neill, Superintendent of Police, Joseph Powell, Christian Meier and Julian W. Mack as Civil Service Commissioners of the City of Chicago, Defendants in error and also of the opinion of the Court rendered therein as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, this 20th day of December A. D. 1910.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

51 Be it remembered, to-wit, that on the 14th day of December, A. D. 1910, there was duly filed by plaintiff in error Charles T. Preston, in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. Alonzo K. Vickers, Chief Justice of the Supreme Court of Illinois, with the endorsement by the Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

52 *Petition for a Writ of Error.*

In the Supreme Court of Illinois.

No. 7063.

CHARLES T. PRESTON, Plaintiff in Error,
vs.
CITY OF CHICAGO et al., Defendant- in Error

To the Honorable Alonzo K. Vickers, Chief Justice of the Supreme Court of Illinois:

And now comes Charles T. Preston, of the City of Chicago, in the County of Cook, in the State of Illinois, plaintiff in error and petitioner herein, by A. B. Chilcoat, his attorney, and complains that in the record and proceedings in said case, including the final judgment of the Supreme Court of the State of Illinois, therein against the plaintiff in error, which final judgment was rendered on the 29th day of June, 1910, the said Supreme Court of the State of Illinois erred, to the great damage of said plaintiff, Charles T. Preston, petitioner herein. And petitioner shows and states unto your Honor the following as such errors, and the basis or grounds for this petition, to-wit:

First. The allegations of petitioner's amended and supplemental petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said amended and supplemental petition, admitted, show that the petitioner was, by the action of said defendants in error set forth in said amended and supplemental petition and judgment of said Superior Court and the affirmance thereof by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the payroll as a police patrolman on the police force, and to perform the functions
53 or duties of a police patrolman, in the department of police of said City of Chicago, and to draw his pay as a police patrolman on said police force, in the department of police in said City of Chicago, as other police patrolmen on said police force, in the department of police, in said City of Chicago, are paid; in this, that the petitioner was, without written notice of charges preferred against him, and without an opportunity to be heard in the defense

of his right, excluded from the exercise of his duties as a police patrolman and deprived of his right to be paid; and that the said action and the approval thereof by said Superior Court of Cook County, and the affirmance thereof by the final judgment of said Supreme Court of Illinois, was and is a deprivation of petitioner's property rights, and was and is in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and also in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

Second. The Supreme Court of the State of Illinois, by its judgment of affirmance herein of the judgment of the Superior Court of Cook County, Illinois, failed to recognize or give effect to the provisions of Section 2 of Article 2 of the Constitution of the State of Illinois; and also failed to recognize and enforce the right to have written charges preferred, against him, and the right to be heard in his defense, as well as the property rights of petitioner herein, secured to him under the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

Third. The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated in petitioner's said amended and supplemental petition, gave the petitioner therein no right to relief as therein and thereby prayed;
which action of said Supreme Court of Illinois was in legal
54 effect, a deprivation of petitioner's property rights, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of petitioner's property rights secured to him by the provisions of Section 1, of Article XIV of the Amendments to the Constitution of the United States of America.

Fourth. The Superior Court of Cook County, Illinois, erred in sustaining the demurrer of the defendants in error to the amended and supplemental petition filed by petitioner in said Superior Court of Cook County, Illinois, on June 5, 1908, and in dismissing the petition of the petitioner, plaintiff in error herein, and the amendments to said petition, at the costs of plaintiff in error herein, and in entering judgment in said cause against this petitioner, plaintiff in error herein; and the Supreme Court of Illinois erred in its judgment affirming said judgment of said Superior Court.

Fifth. The Superior Court of Cook County, Illinois, erred in entering judgment in said cause of November 5, 1908, dismissing the petition of your petitioner, plaintiff in error in said suit, and the amendments to said petition, at the costs of this plaintiff in error, and in entering judgment in said cause against petitioner, plaintiff in error therein, for costs; and the Supreme Court of the State of Illinois erred in its judgment affirming said judgment of said Superior Court.

Wherefore petitioner hereby prays a writ of error from said decision and judgment to the Supreme Court of the United States of America, and an order fixing the amount of the bond.

CHARLES T. PRESTON,
Petitioner.

By A. B. CHILCOAT,
His Attorney.

Filed Dec. 14, 1910.

J. McCAN DAVIS,
Clerk of Supreme Court.

STATE OF ILLINOIS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the said plaintiff in error, Charles T. Preston, in the sum of Five Hundred Dollars.

Dated Nov. 12th, 1910.

ALONZO K. VICKERS,
Chief Justice of Supreme Court of Ill.

[Endorsed:] No. 7063. Petition for Writ of Error. In the Supreme Court of Illinois.

55 Be it remembered that on the 14th day of December, A. D. 1910, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Charles T. Preston, plaintiff in error, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows, to-wit:

56

Copy.

No. 7063.

CHARLES T. PRESTON, Plaintiff in Error,
vs.
THE CITY OF CHICAGO et al., Defendants in Error.

Bond.

Know All Men By These Presents, That we, Charles T. Preston, as principal, and the Illinois Surety Company, a corporation duly organized under the laws of the State of Illinois, and doing business in the City of Chicago, in the County of Cook and State of Illinois, as sureties, are held and firmly bound unto the said City of Chicago, in the sum of Five Hundred Dollars to be paid to the said city, *in* which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these present.

Sealed with our seals, and dated this — day of November, 1910

The condition of this obligation is such that:

Whereas, a judgment was, on the 29th day of June, 1910, rendered, by the Supreme Court of the State of Illinois, in said cause then pending in said Supreme Court, against said plaintiff in error, and

Whereas, the said plaintiff in error seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in said cause by the Supreme Court of the State of Illinois, and

COPY

Whereas, a writ of error has been allowed for the removal of said cause to the Supreme Court of the United States.

Now, if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

CHARLES T. PRESTON, [SEAL.]
ILLINOIS SURETY COMPANY. [SEAL.]
By A. J. HOPKINS, *President.* [SEAL.]

Attested:

M. A. DUNNING. [SEAL.]
Assistant Secretary.

Approved this 23rd day of November, A. D. 1910.

ALONZO K. VICKERS,
Chief Justice of the Supreme Court of Illinois.

Subscribed and sworn to before me this 22d day of November, A. D. 1910.

[SEAL.] H. R. HARRIS, JR.,
Notary Public.

Filed Dec. 14, 1910.

J. McCAN DAVIS,
Clerk of Supreme Court.

57 Form 30. 8-09. 1 M.

STATE OF ILLINOIS,
County of Cook, ss:

I, J. Howard Cahill, a Notary Public in and for the County and State aforesaid, do hereby certify A. J. Hopkins, President, and M. A. Dunning, Ass't Secretary of the Illinois Surety Company, who are personally known to me to be the same persons whose names are subscribed in the foregoing instrument as such President and Ass't Secretary, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, and as the free and voluntary act of the said Illinois Surety Company for the uses and purposes therein set forth, and caused the corporate seal of said Company to be thereto attached.

Given under my hand and Notarial Seal, this 22nd day of November, 1910.

[SEAL.] J. HOWARD CAHILL,
Notary Public.

58 Be it remembered that on the 14th day of December, A. D. 1910, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in words and figures as follows to-wit:

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Charles T. Preston, plaintiff in error, and the City of Chicago et al., defendants in error, wherein was drawn in question a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of there being repugnant to the Constitution, treaty, or laws of the United States, and the decision was in favor of such validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; as manifest error hath happened to the great damage of Charles H. Preston, as by his petition appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have
60 & 61 the same in said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of December, in the year of our Lord one thousand nine hundred and ten.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.

JOHN H. R. JAMAR,
Clerk Circuit Court United States,
District of Illinois.

Allowed by

HON. ALONZO K. VICKERS,
Chief Justice of the Supreme Court of Illinois.

Filed Dec. 14, 1910.

J. McCAN DAVIS,
Clerk of Supreme Court.

* * * * * * *

62 Be it remembered that on the 17th day of December, A. 1910, there was duly filed in the office of the Clerk of t Supreme Court of Illinois the Citation showing service on attorne for defendant in error, the City of Chicago, et al., which docume is in words and figures as follows to-wit:

63 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to City of Chicago and Carter Harrison, Francis O'Neill, Superintendent of Police; Josep Powell, Christian Meier and Julian W. Mack, as Civil Service Co missioners of the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at and b fore the Supreme Court of the United States at Washington, D. within thirty days from the date hereof pursuant to a writ of err filed in the office of the Clerk of the Supreme Court of the State Illinois, wherein Charles T. Preston was plaintiff in error and y are defendants in error, to show cause, if any there be, why the jud ment rendered against the said plaintiff in error, as in said writ error mentioned, should not be corrected, and why speedy justi should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State Illinois, this 13th day of December, 1910.

ALONZO K. VICKERS,
Chief Justice, Supreme Court of Illinois.

Attest:

[Seal of the Supreme Court, State of Illinois.
Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

I, Attorney of record for the defendant in error in the above e titled case, hereby acknowledged due service of the above citatio and enter an appearance in the Supreme Court of the United State

EDWARD J. BRUNDAGE,
Corporation Counsl, and
ROBERT R. JAMPOLIS,
Assistant Corporation Counsel,
Attorneys for the City of Chicago et al.

[Endorsed:] Filed Dec. 17, 1910. J. McCan Davis, Clerk of S preme Court.

64 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewit transmit to the Supreme Court of the United States, a duly certifie

transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 20th day of December A. D. 1910.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

65 In the Supreme Court of Illinois.

No. 7063.

CHARLES T. PRESTON, Plaintiff in Error,
vs.
CITY OF CHICAGO et al., Defendants in Error.

Assignment of Errors.

And now comes Charles T. Preston, of the City of Chicago, in the County of Cook, in the State of Illinois, plaintiff in error and petitioner herein, by A. C. Chilcott, his attorney, and complains that in the record and proceedings in said case, including the final judgment of the Supreme Court of the State of Illinois, therein against the plaintiff in error, which final judgment was rendered on the 29th day of June, 1910, the said Supreme Court of the State of Illinois erred, to the great damage of said plaintiff, Charles T. Preston, petitioner herein. And petitioner shows and states unto your Honor the following as such errors, and the basis or grounds for this petition, to-wit:

First. The allegations of petitioner's amended and supplemental petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said amended and supplemental petition, admitted, show that the petitioner was, by the action of said defendants in error set forth in said amended and supplemental petition and judgment of said Superior Court and the affirmance thereof by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the payroll as a police patrolman on the police force, and to perform the functions or duties of a police patrolman, in the department of police of said City of Chicago, and to draw his pay as a police patrolman on said police force, in the department of police in
66 said City of Chicago, as other police patrolmen on said police force, in the department of police, in said City of Chicago, are paid; in this, that the petitioner was, without written notice of charges preferred against him, and without an opportunity to be heard in the defense of his right, excluded from the exercise of his duties as a police patrolman and wrongfully denied his right to be paid as such police patrolman; and that the said action and the

approval thereof by said Superior Court of Cook County, and t
affirmance thereof by the final judgment of said Supreme Cou
of Illinois, was and is a deviation of petitioner's property righ
and was and is in violation of Section 2 of Article 2 of the Consti
tion of the State of Illinois, and also in violation of Section 1
Article XIV of the Amendments to the Constitution of the Unit
States of America.

Second. The Supreme Court of the State of Illinois, by its jud
ment of affirmance herein of the judgment of the Superior Court
Cook County, Illinois, failed to recognize or give effect to the p
visions of Section 2 of Article 2 of the Constitution of the State
Illinois; and also failed to recognize and enforce the right to ha
written charges preferred, against him, and the right to be heard
his defense, as well as the property rights of petitioner herein,
cured to him under the provisions of Section 1 of Article XIV of t
Amendments to the Constitution of the United States of Americ

Third. The Supreme Court of the State of Illinois, by its jud
ment in said cause affirming the judgment of said Superior Court
Cook County, Illinois, determined and held that the facts, stated
petitioner's said amended and supplemental petition, gave the pe
tioner therein no right to relief as therein and thereby praye
which action of said Supreme Court of Illinois was in legal effe
a deprivation of petitioner's property rights, in violation of Secti
2 of Article 2 of the Constitution of the State of Illinois, a
67 in violation of petitioner's property rights secured to hi
by the provisions of Section 1 of Article XIV of the Amen
ments to the Constitution of the United States of America.

Fourth. The Superior Court of Cook County, Illinois, erred
sustaining the demurrer of the defendants in error to the amend
and supplemental petition filed by petitioner in said Superior Cou
of Cook County, Illinois, on June 5, 1908, and in dismissing t
petition of the petitioner, plaintiff in error herein, and the amen
ments to said petition, at the costs of plaintiff in error herein, a
in entering judgment in said cause against this petitioner, plaint
in error herein; and the Supreme Court of Illinois erred in its jud
ment affirming said judgment of said Superior Court.

Fifth. The Superior Court of Cook County, Illinois, erred
entering judgment in said cause of November 5, 1908, dismissi
the petition of your petitioner, plaintiff in error in said suit, a
the amendments to said petition, at the costs of this plaintiff
error, and in entering judgment in said cause against petitione
plaintiff in error therein, for costs; and the Supreme Court of t
State of Illinois erred in its judgment affirming said judgment
said Superior Court.

For which errors the said Charles T. Preston, plaintiff in err
herein, prays the said judgment of the Supreme Court of the Sta
of Illinois, dated June 29, 1910, be reversed and a judgment re
dered in favor of Charles T. Preston, plaintiff in error herein.

CHARLES T. PRESTON,
Plaintiff in Error.

By A. B. CHILCOAT,
His Attorney.

68 Supreme Court of United States.

Case No. 840.

CHARLES T. PRESTON, Plaintiff in Error.
vs.
CITY OF CHICAGO et al., Defendants in Error.

Stipulation as to Printing Record.

It is stipulated by and between Allen B. Chilcoat, counsel for plaintiff in error, and Edward Brundage, Corporation Counsel of the City of Chicago, and counsel for defendants in error, that in order to save expenses of the printing of the record herein, the same being sufficient to show the errors complained of and no more, to-wit:

Citation, and acceptance of service.
Writ of Error.
Clerk's return of Writ of Error.
Petition, filed March 11, 1903.
Amended and supplemental petition, filed December 2, 1908.
Judgment, December 5, 1908.
Assignments of Errors.
Bond on Writ of Error.
Petition for Writ of Error.
Order granting Writ of Error.
Clerk's certificate of Transcript.
Opinion of the Supreme Court of Illinois.

It is further stipulated and agreed, that if from oversight or omission any part of the record be not thus printed, that the plaintiff in error has the right to print or may be required by defendants in error to print any further or additional portions thereof.

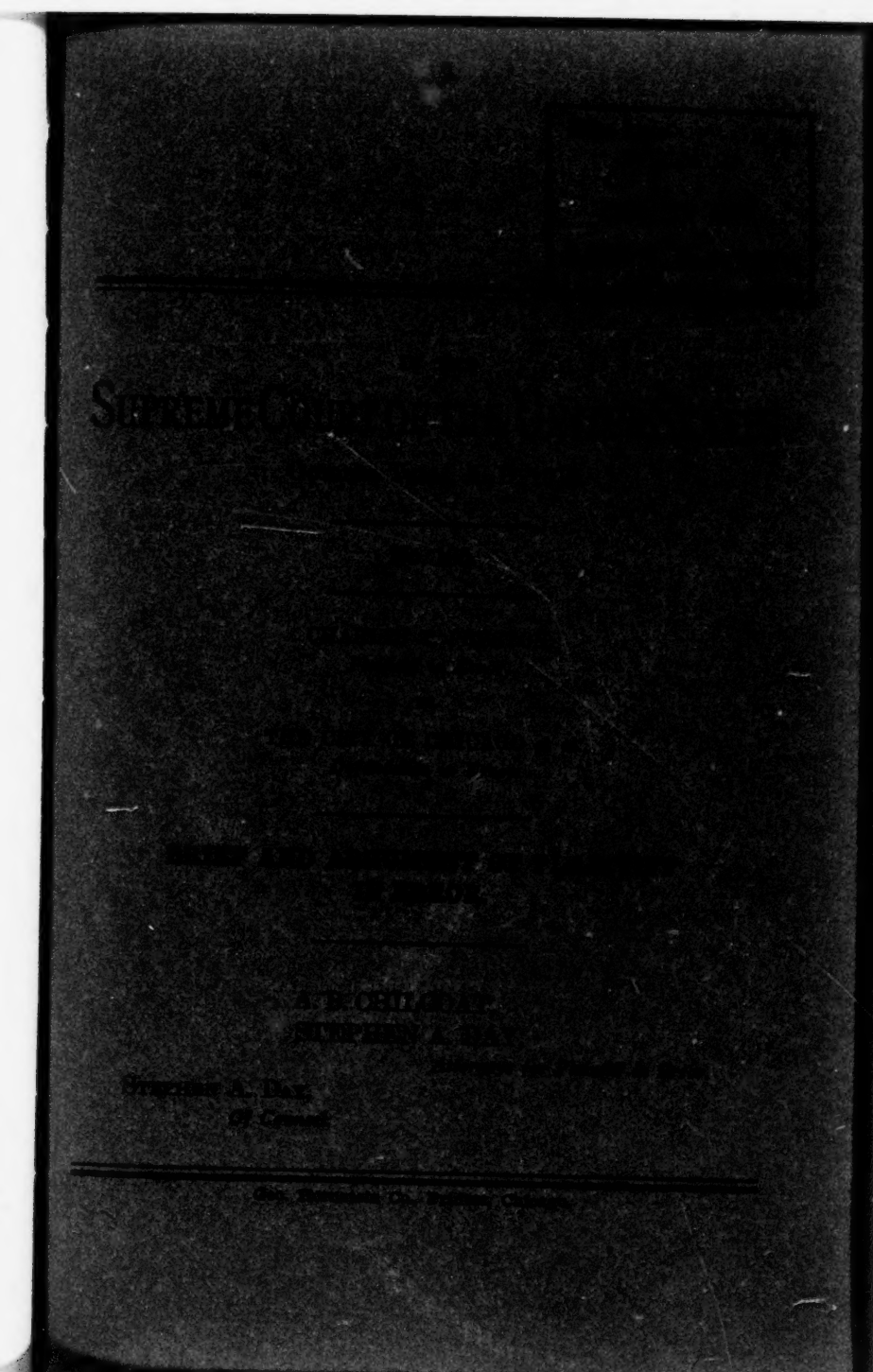
ALLEN B. CHILCOAT,
Counsel for Plaintiff in Error.
EDWARD J. BRUNDAGE,
Corporation Counsel and Counsel for Defendant in Error.

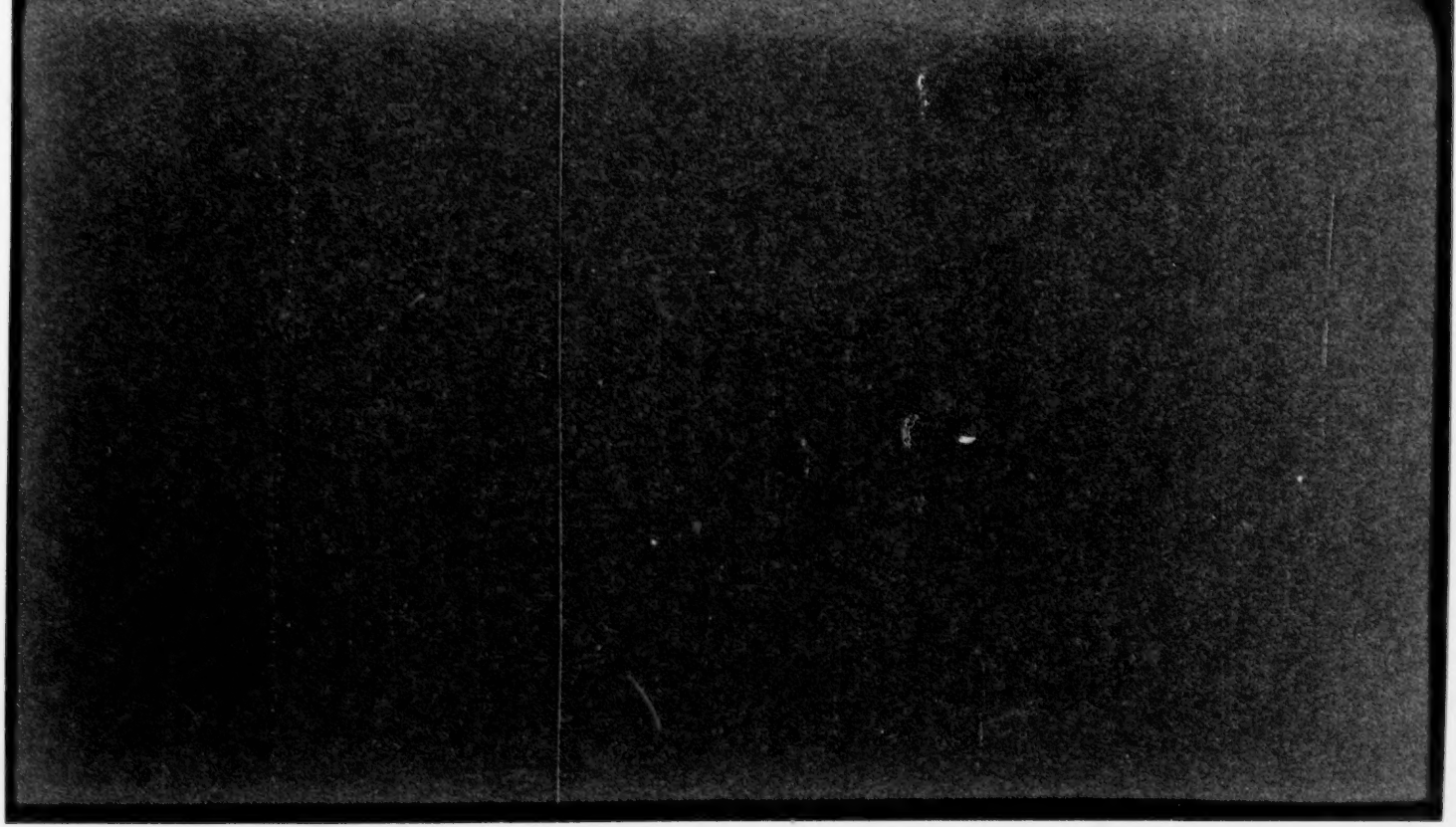
Mch. 29, 1911.

[Endorsed:] 22,461. Case No. 840. Supreme Court of the United States. Charles T. Preston, Plaintiff in Error, vs. City of Chicago et al., Defendants in Error. Stipulation as to Printing Record. Allen B. Chilcoat, Counsel for Plaintiff in Error.

69 [Endorsed:] File No. 22,461. Supreme Court U. S. October Term, 1910. Term No. 840. Charles T. Preston, Pl'ff in Error, vs. The City of Chicago. Stipulation to omit parts of record in printing. Filed M'ch 31, 1911.

Endorsed on cover: File No. 22,461. Illinois Supreme Court. Term No. 840. Charles T. Preston, plaintiff in error, vs. The City of Chicago et al. Filed December 30th, 1910. File No. 22,461.





SUBJECT INDEX.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 195.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.,
Defendants in Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT.

May it please the Court:

We have heretofore filed in this court briefs upon our motion to advance and in opposition to motion of defendants in error to dismiss or affirm, and we respectfully call the attention of the court to the argument therein contained. The salient facts in the case are set forth in these briefs and it will therefore be unnecessary for us to repeat them at this time.

The merits of this case lie within a narrow compass. Plaintiff in error filed his petition in the state

court of original jurisdiction and a general demurrer was filed thereto on behalf of the defendants in error. The state court sustained said demurrer and the petition was ordered dismissed. After writ of error to the Supreme Court of Illinois, this judgment was affirmed (Opinion 246 Illinois, 26). The sole question, therefore, is whether the petition sets forth facts which entitled plaintiff in error to the relief sought. The petition was filed under the Illinois statute, regulating the writ of mandamus and appropriate allegations of fact are therein set forth showing that relator was a duly qualified and acting policeman in the City of Chicago, at the time of his unlawful and arbitrary removal from the pay-roll of policemen in said city, and sufficient facts are presented to establish the validity of relator's claim.

The attempted removal of relator from the pay-roll aforesaid was illegal and was not only without due process of law, but without any process of law. There is no contradiction of the fact that relator was removed from the pay-roll of policemen in said city without notice of any charges preferred against him and without any opportunity to be heard in his defense. No charges of any kind whatever were made against him and he was given no hearing whatever. The removal was summary, arbitrary and a mere exercise of power, if any such existed within the officer seeking to remove him. The demurrer admits the allegation in the petition, that plaintiff in error was not guilty of any misconduct on his part.

The real question in this case is whether relator was deprived of any right protected by the Federal Constitution. To understand what legal rights were

acquired by him and which were arbitrarily and ruthlessly taken from him in violation of the Federal Constitution, it will be necessary for us to show to this court the facts upon which our claim of a denial of constitutional liberty are based.

We approach the development of our positions with confidence that the exercise of a Federal right was denied to relator in three different aspects of the case:

1. Relator was illegally removed from the pay-roll of policemen.
2. Relator was removed from said pay-roll without due process of law and was denied equal protection of the laws.
3. Relator was deprived of his right to share in the Polic Pension Fund illegally and without due process of law.

Assignments of Error.

First: The allegations of relator's petition, and amended and supplemental petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said amended and supplemental petition, admitted, show that the relator was, by the action of said defendants in error set forth in said amended and supplemental petition, and in the judgment of said Superior Court and the affirmance thereof by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the pay-roll as a police patrolman in the uniformed police force in the department of police of said City of Chicago, and to draw his pay as a police patrolman in

said police force, in the department of police in said City of Chicago, as other police patrolmen on said police force, in the department of police, in said City of Chicago, are paid; in this, that the petitioner was, without due notice of charges preferred against him as a police patrolman in the uniformed police force of the City of Chicago, excluded from the exercise of his duties as such police patrolman and deprived of his right to be paid; and that the said action and the approval thereof by said Superior Court of Cook County, and the affirmance thereof by the final judgment of said Supreme Court of Illinois, was and is a deprivation of petitioner's legal rights, and was and is in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and also in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

Second: The Supreme Court of the State of Illinois, by its judgment of affirmance herein of the judgment of the Superior Court of Cook County, Illinois, failed and refused to recognize or give effect to the provisions of Section 2 of Article 2 of the Constitution of the State of Illinois; and also failed and refused to recognize and enforce the rights of petitioner herein, by *affording him an opportunity to be heard in his defense*;—a right secured to him under the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Third: The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated

in petitioner's said amended and supplemental petition, gave the petitioner therein no right to relief as therein and thereby prayed; which action of said Supreme Court of Illinois was, in legal effect, *a deprivation of petitioner's right to the equal protection of the law*, in violation of petitioner's right secured to him by the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fourth: The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated in relator's said petition, and amended and supplemental petition, gave the relator therein no right to relief as therein and thereby prayed; which action of said Supreme Court of Illinois was, in legal effect, a deprivation of relator's property rights, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of relator's property rights secured to him by the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fifth: The Superior Court of Cook County, Illinois, erred in sustaining the demurrer of the defendants in error to the amended and supplemental petition filed by relator in said Superior Court of Cook County, Illinois, on June 5, 1908, and in dismissing the petition, of the relator, plaintiff in error herein, at the costs of plaintiff in error herein, and in entering judgment in said cause against this relator, plaintiff in error herein; which resulted in abridging the privileges or immunities of a citi-

zen of the United States, as well as of a citizen of the State of Illinois, and was and is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States; and the Supreme Court of Illinois erred in its judgment affirming said judgment of said Superior Court.

Sixth: The Superior Court of Cook County, Illinois, erred in entering judgment in said cause of November 5, 1908, dismissing the petition of your relator, plaintiff in error in said suit, and the amendments to said petition, at the costs of this plaintiff in error, and in entering judgment in said cause against relator, plaintiff in error therein, for costs; and the Supreme Court of the State of Illinois erred in its judgment affirming said judgment of said Superior Court.

BRIEF.

I.

Relator was classified and certified by the Civil Service Commission as an officer in the classified civil service of the City of Chicago and is entitled to notice and hearing before removal.

Civil Service Act, City of Chicago, Hurd's Rev. Stat. Illinois (1912), page 393 *et seq.*

The People v. *Kipley*, 171 Illinois, 44.

People v. *Loeffler*, 175 Illinois, 585.

City of Chicago v. *Luthardt*, 191 Illinois, 516.

Ptacek v. *The People*, 194 Illinois, 125.

Id., Chicago Law Journal for June 8, 1900.

Powell v. *Bullis*, 221 Illinois, 379.

McNeill v. *The City of Chicago*, 93 Illinois Appellate, 124; 212 Illinois, 481.

Second Annual Report, Civil Service Commission of City of Chicago, for year ending December 31, 1896.

Gilbert v. *Board of Police, etc., of Salt Lake City*, 11 Utah, 378; 40 Pacific Reporter, 264.

The People ex rel. Wilson v. *Knox et al.*, 61 New York Supplement, 472.

People ex rel. Gorman v. *Police Board*, 35 Barber, 527.

Emmitt v. *Mayor, etc., of New York*, 128 New York, 117.

Larsen v. *City of St. Paul*, 83 Minnesota, 473; 86 Northwestern Reporter, 459.

State v. *Wyman*, 71 Ohio St., 1.

Eckloff v. *District of Columbia*, 135 U. S., 240.

State v. *Walbridge*, 153 Missouri, 194; 54 Southwestern Reporter, 447; 41 American State Reports, 663.

Gracey v. *City of St. Louis*, 213 Missouri, 384; 111 Southwestern Reporter, 1159.

Garfield v. *United States*, 211 U. S., 249.

United States ex rel. Turner v. *Fisher*, 222 U. S., 204.

United States v. *Wickersham*, 201 U. S., 390.

II.

Office of police patrolman was created by State of Illinois in 1863 providing charter for City of Chicago, and such office was not abolished by subsequent statutes of that state.

Stott v. *City of Chicago*, 205 Illinois, 281.

Bullis v. *City of Chicago*, 235 Illinois, 472.

Roth v. *State of Indiana*, 158 Indiana, 243; 63 Northeastern Reporter, 460.

Charter City of Chicago, of March 4, 1837, 1863, 1865. Private Laws Illinois.

Cities and Villages Act, Illinois.

Hurd's Rev. Stat. Illinois (1912), page 243 *et seq.*

Brennan v. *The People ex rel. Kraus et al.*, 176 Illinois, 620.

City of East St. Louis v. *Maxwell*, 99 Illinois, 439.

Gunnarshon v. *City of Sterling*, 92 Illinois, 569.

III.

Relator was deprived of his rights illegally.

Wilson v. *North Carolina*, 169 U. S., 586.
Meade v. *Deputy Marshal*, 1 Brock., 324.
Yick Wo v. *Hopkins*, 118 U. S., 356.

IV.

Relator was deprived of a fundamental right without due process of law and was denied the equal protection of the laws in violation of the Fourteenth Amendment.

Allen v. *Georgia*, 166 U. S., 140.
Hovey v. *Elliott*, 167 U. S., 409.
Kennard v. *Louisiana*, 92 U. S., 480.
Foster v. *Kansas*, 112 U. S., 201.
Wilson v. *North Carolina*, *supra*.
Louisville and Nashville Railroad Company v. *Schmidt*, 177 U. S., 230.
Taylor v. *Beckham*, 178 U. S., 548.
Iowa Central Railroad Company v. *Iowa*, 160 U. S., 389.
Cincinnati Street Railway Company v. *Snell*, 193 U. S., 30.
Rogers v. *Peck*, 199 U. S., 425.
Simon v. *Craft*, 182 U. S., 427.
Jordan v. *Massachusetts*, 225 U. S., 167.
Story, Constitution (Fourth Edition), Sec. 1950.

V.

Relator was deprived of his right to share in the Police Pension Fund illegally and without due process of law.

Police Pension Fund Law, Illinois, Hurd's Rev. Stat. Illinois (1912), page 369 *et seq.*

Pennie v. *Reis*, 132 U. S., 464.

ARGUMENT.

I.

We insist that the relator, being in office as a police patrolman at the time of the classification of offices by the Civil Service Commission, as set forth in his petition, became at once, upon such classification, and by virtue of said act, an officer in the classified civil service in said city, and entitled to all the protection conferred by that act upon such officers.

Relator under the statutory law of the State of Illinois was a municipal officer in the City of Chicago at the time of his attempted removal. Under the provisions of the Civil Service Act of that state in force in the City of Chicago commencing in 1895, all offices and places of employment in such city were classified and it was provided that all offices and places so classified by the Civil Service Commission should constitute a classified civil service and that no appointments to any such offices or places should be made, except under and according to the rules therein mentioned. By the terms of this act all previous inconsistent laws were repealed and the purpose of the act was to put an end to the appointment and removal of officers at the pleasure of the appointing power. Certain exceptions are made in Section 11 of the act, but as they apply only to elective officers, members of the Board of Education, heads of the principal departments of the city, etc., it is unimportant to dwell thereon.

Under the power granted by this act the Civil Service Commission in Chicago classified the offices and places in said city and under such classification Class A was made to include the official service as opposed to Class B, which includes places of employment and of lesser degree. Under Rule 1 of said commission, Section 4 thereof, it was provided that:

> "For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon amount of compensation."

Among the several divisions of the official service is found the following:

> "Division D. POLICE SERVICE. All persons in the uniformed police force."

The relator, at the time of such clasification, was in the uniformed police force of said city, and by virtue of the action just recited became a member of the official service of said city and as such a municipal officer. We respectfully call the attention of the court at this point to our brief filed upon the motion to advance this case, wherein is fully set forth (page 25 *et seq.*) the provisions of the Civil Service Act and the rules of said Civil Service Commission.

By the terms of said act it was provided that no officer or employe in the classified civil service of any city who should have been appointed under the

rules and after the examination therein mentioned should be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. We contend, without fear of contradiction, that after the taking effect of this act removals of officers, at the pleasure of the appointing power and without having charges preferred and a hearing in their defense, were no longer possible under the statutory law of Illinois. The plain intent and purpose of the act is to recognize those already in office and substitute for the future a system of appointments based upon merit, and to provide for removals only for sufficient cause. The mere arbitrary exercise of power on the part of appointing officials was rendered illegal and ineffectual thereafter.

As we have said, this act went into effect in the City of Chicago in the year 1895. Its construction first came before the Supreme Court of Illinois in the case of *The People* v. *Kipley*, 171 Ill., 44, 75, wherein was clearly presented the question as to whether the Civil Service Act superseded prior enactments with reference to the police department in the City of Chicago. In that case, the court, speaking through Mr. Justice Magruder, said:

> "These ordinances further provide, that there shall be certain subordinates or assistants for each of these departments, who are specifically named in the ordinance. By the terms of the ordinances all of these subordinates or assistants, with a few exceptions to be hereafter mentioned, were appointed in each department by the head of that department, either with the approval and consent of the Mayor, or without

such approval or consent. * * * *It is conceded by counsel on both sides in their arguments, that the legislature passed the Civil Service act with full knowledge of the ordinances of the city of Chicago, which designated each of officers already named as the head of each of the departments above mentioned.*

* * * * * * * *

"But section 11 also says that officers 'whose appointment is subject to confirmation by the city council' shall not be included in the classified service. * * * Section 3 provides that the commissioners shall classify all the offices and places of employment in the city with reference to the examinations provided for, except the offices and places of employment mentioned in section 11. * * * *When these words of section 3 are applied to section 11, section 11 means, that all officers and employes of 'any principal department of the city' except the head 'or heads' thereof shall be included in the classified service.* * * *

"*That ordinance requires, that certain subordinate officers or employes in certain of the principal departments of the city government shall be 'designated as heads of principal departments,' as said term is used in section 11 of the Civil Service act, 'and shall be nominated by the mayor and shall be confirmed by the city council.'* * * * *If it is a valid ordinance, and has the effect which it was intended to have, it will certainly nullify and make worthless the Civil Service act.* * * * The ordinance does not create any new office or any new department, but simply provides that certain subordinate officials in departments already created shall be designated as heads of principal departments, and shall be appointed in a different manner from that, in which existing ordinances require them to be appointed. * * * The ordinance of June 28 provides in effect,

that certain designated subordinates in the principal departments of the city government shall not be included in the classified service. *The ordinance is, therefore, directly in the teeth of the statute.* * * *

"**The Civil Service act provides that all laws or parts of laws, which are inconsistent with it or with any of its provisions, were thereby repealed. Hence, any provision, either of the City and Village act, or of any ordinance of the city, which provided for a different mode of appointment than that specified in the Civil Service act, was repealed, except so far as it might come within the exception named in section 11.**

"Our conclusion upon this branch of the case is, that the assistant superintendent of police, inspectors of police and captains of police, are not excepted from the operation of the Civil Service law by the provisions of section 11, or any other provision in the act. *The same is true as to all positions in the other principal departments of the city government herein mentioned, which are of a lower grade than the chiefs or heads of those departments or which are subordinate to such chiefs or heads.*" (Italics ours.)

Soon thereafter, the construction of said act came before that court upon an original petition for mandamus filed by the People, on the relation of the Attorney General, against one Loeffler, City Clerk of the City of Chicago, who, insisting upon the power to appoint the clerks and subordinate officials in his office, refrained from complying with the terms of the Civil Service Act and maintained that the provisions of said act had no application to the subordinate officials and clerks within his office. The question was thus clearly and early called to the attention of the highest court in Illinois and by the

decision of that court it was settled that the Civil Service Act did have application to the various clerks and subordinates in the office of the City Clerk of Chicago, inasmuch as the act required that *all* offices and places of employment in said city be classified, and when so classified should constitute the civil service of said city. It was insisted on the part of Loeffler that the provisions of the Civil Service Act did not take away the arbitrary power of appointment and removal theretofore vested in the City Clerk and that there was no repeal of the previously existing law by the terms of the Civil Service Act. In answer to that contention, the Supreme Court of Illinois said:

> "The provisions of the Civil Service Act are in conflict with Section 22 of Article 7 of the City and Village Act. Under Section 22 the City Clerk had the power to appoint his employes, and such appointments were during his pleasure. But the Civil Service Act establishes a new system by which all city employes are to be selected on account of their fitness and merit, as ascertained by examinations held under and in pursuance of the law. The act, which requires appointments thus to be made, is necessarily in conflict with an act, which left such appointment to the uncontrolled will and discretion of the appointing power. It is true that there is no express repeal in the Civil Service Act of said Section 22. It is also true that repeals by implication are not favored. But the Civil Service Act is subsequent in date by a period of more than twenty years, to the City and Village Act; and, where there is an irreconcilable inconsistency between an older act and a later act it will be presumed that the Legislature intended by the latter to repeal the

former. A subsequent statute, which revises the whole subject of a former one and is intended as a substitute for it, operates as a repeal of the former, although there are no express words of repeal. The object of Section 22, above referred to, was to designate a particular mode for the appointment of the employes of the City Comptroller, City Clerk, City Treasurer and City Collector. That mode may be termed the pleasure of the appointing power. The object of the Civil Service Act is to designate another and different mode of appointing such employes, and that mode is fitness and merit, as ascertained by free and public and competitive examinations. Where, by the language used in a statute, a thing is limited to be done in a particular manner, 'it includes a negative that it shall not be done otherwise.' Where the appointments to all subordinate positions under the city government are required by an affirmative enactment to be made upon the basis of merit and fitness as ascertained by examinations, there is necessarily included in such enactment a prohibition against appointments made at the will of the appointing power. The two methods of appointment thus indicated are so inconsistent with each other that Section 22 and the Civil Service Act, considered with reference to the positions therein named, cannot stand together; and, therefore, the repeal of Section 22 is inferred from necessity.

* * * * * * * *

"That there is such repugnancy, as is above referred to, between said Section 22 and the provisions of the Civil Service Act will appear from an examination of the law. Section 3 of the Civil Service Act provides that: 'Said commissioners shall classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this

act.' The City Comptroller, the City Clerk, the City Treasurer and the City Collector are city officials and a part of the city government. Therefore, the subordinate positions and places of employment under these officials come under the designation of 'offices and places of employment in such city.' All the offices and places of employment in such cities, and not a part of them, except those mentioned in Section 11, are to be classified under the Civil Service Act. It necessarily follows that the subordinate places under the City Clerk fall among the places of employment which are subject to classification. By the terms of Section 11, the four officials named in Section 22 are not included in the classified service, but the exceptions mentioned in Section 11 do not include clerks and subordinates in the offices named in Section 22. It is difficult to see how an act, which provides that all offices and places of employment in the city, except those named in Section 11, shall be classified by the Civil Service Commissioners, can be consistent with Section 22 of the City and Village Act, which provides, in substance, that the clerks and subordinates of four particular city officials shall be appointed in a different mode from that contemplated by such classification." (*People* v. *Loeffler*, 175 Illinois, 585, 592.)

The above case was cited with approval in the later case of *City of Chicago* v. *Luthardt*, 191 Ill., 516, wherein, by *per curiam* opinion, the Supreme Court of Illinois adopted as its opinion, that of Mr. Justice Windes of the Appellate Court of that state. After referring to the fact that it had been contended that the relator in that case was not an officer in the strict sense, the eminent judge refers to the above case, and, proceeding with his opinion (page 521) says:

"Section 3 of the Civil Service Act empowers the Commissioners to classify all the offices and places of employment in the city, except those who are elected by the people and others specified in Section 11 of the act, not now in question, and provides that the offices and places so classified by the commission shall constitute the classified Civil Service of the city. Section 4 of the same act provides that the Commissioners shall make rules for carrying out the purposes of the act, and for examinations, appointments and removals in accordance with its provisions. The commissioners did adopt rules, classified the offices and places of employment into two general classes, known as class 'A' and class 'B', respectively. These rules provide (No. 3) that class 'A' shall be known as the Official service and class 'B' as the labor service, and under the further provisions of the rules as to classification, the chief clerk of the detective bureau falls in class 'A', division 'C' and grade 5. It will thus be seen that under the Civil Service Act and the rules of the commissioners the position of appellee was that of a municipal officer, within the meaning of this act."

The correctness of the above statement with respect to the Civil Service Act in the City of Chicago is not and cannot be questioned. It is the settled law of that state. But it has been contended that inasmuch as the relator was one of a large number of officers who were in office at the time of the adoption of said act (and necessarily did not take any examination and was not required so to do), that the benefits of the act against removal, except for cause and after notice and hearing, were not hereby accorded to him and those similarly situated. The unsoundness of this contention is at once apparent. Rather than ex-

tend this brief by argument on our part, we desire only to call attention to the well reasoned opinion of Judge Tuley, reported in the Chicago Law Journal, June 8, 1900, affirmed by the Appellate Court, and by the Supreme Court of Illinois in the case of *Ptacek* v. *The People*, 194 Ill., 125.

That learned and greatly respected Judge said:

> "All the offices and places of employment were duly classified and became the classified civil service of the city. The police had its superintendent, its assistant superintendent, inspectors of police, captains, lieutenants, sergeants and patrolmen. *As soon as that classification was made the entire police force came under the law.* No reasons can be perceived, as 'holdovers' belonged to the classified civil service, why they with others composing one rank or grade, could not compete for the next highest rank or grade in any promotional examination ordered to take place. *The act was clearly intended to apply to the entire force in the condition in which it might be found when such classification should be completed.*"

It should further be borne in mind, in considering Judge Tuley's opinion, that the point specially under consideration by him was the right of "holdover" policemen, under the provisions of the act, to take the promotional examinations provided for in the act itself and the rules adopted by the Civil Service Commission thereunder. Upon this point the learned jurist spoke as follows:

> "Can there be any other examinations than those expressly provided for in Section 6 and 9? This is an important question in connection with the right of the 'holdover' to become a civil service appointee, and to have the benefit

of the law in protecting him in the tenure of his office. The requirement of the law that 'all offices and places should be classified, and when thus classified shall constitute the classified civil service of the city,' *shows an intent to bring every official and employe so classified under the operation of the law.* Section 11 of the act exempting specifically certain named officials from its operation, shows an intent that all others shall be subject to the act; but when do they become subject to all the provisions of the act is the question. The city contends, not until all the offices and places have become filled with civil service appointees, appointed to fill vacancies that occur from time to time. Under such a construction of the act, its benefit would be postponed indefinitely. It is true a certain section of the act, Section 12, prohibiting removal or discharge, except upon written charges and an opportunity to be heard, is limited to the officers and employes in the classified civil service, who shall have been appointed under the rules of the Commission and after examination. This would seem to make a distinction between appointees under the act, and those who were in offices and places at the time the act went into effect, and generally called 'holdovers.' As all were 'holdovers' when the act went into effect, it would be a strained construction of the act to hold that it was the intent of the law to await the slow process of filling vacancies before there could be a complete civil service in the city.

"Considering the abuses sought to be remedied, and the object and purposes of the law in establishing the merit system, a liberal construction of the act should be made in order to effect the purpose intended. *I am of the opinion that the intention of the Legislature was to bring every office and place of employment in the city, except those mentioned in Section 11, under the complete operation of the law at the*

> *earliest possible moment, and that the officers and employes in office at the time that the act went into effect, as well as the public, should receive the benefit of all its provisions.* * * * The necessity of doing away with the distinction between 'holdovers' and civil service appointees must be apparent, and there can be no doubt but that the efficiency of the civil service will be greatly promoted by securing to every official and employe the right to hold his position until discharged for cause, after a hearing upon written charges, and also the right to seek promotion upon his merits." (Italics ours.)

The complete answer to such contention is that all in office, classified at the time said act went into effect were original appointees under the act and of course were not required to take an examination. The act by its terms is prospective in its operation as to those seeking appointment after its adoption, and the very idea of classification of existing offices and places of employment would be idle and meaningless, if it did not recognize that there were such offices and places of employment already in existence. We quote the following from the opinion by Mr. Chief Justice Wilkin of the Supreme Court of Illinois, in *Ptacek* v. *The People*, *supra* (page 131):

> "There is no rule of the commission authorizing an original examination to be held, in the first instance, to fill each and all of the positions in the police department, and if there was, it could not be enforced in view of the foregoing provisions of Section 3 of the act, which authorizes the Civil Service Commission to classify all the offices and places in the city with reference to examinations afterwards provided for, and making that classification the classified civil service of the city, and prohibiting ap-

pointments to any of such offices or places except under and according to the rules of the commission. This section manifestly contemplates that the classification, in the first place, shall be made without any original examination. Section 9, which is the only section of the act providing for the filling of vacancies in the service, requires such vacancies to be filled by promotion and Sections 1 and 3 of Rule 10 can be given practical effect only by such promotional examinations.

"Appellant contends that Section 6 of the act contemplates an original examination in every instance, and that it has been violated by the commission in the adoption of the foregoing sections of Rule 10. That section is as follows: 'All applicants for offices or places in said classified service, except those mentioned in Section 11 [which exception is not material in this consideration], shall be subject to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, health, habits and moral character,' etc. We think it clear, in view of the provisions of Section 9, that this provision relates only to such original examinations as may be held under the act, and not to promotional examinations, as contemplated by the latter section—that is, to original appointments to the position of second-class patrolman. By this construction the various sections of the act and the rules adopted by the board are brought into harmony, and, in our opinion, will give effect to the object and purposes of the act. We do not understand how the Civil Service Commission could, under its rules, hold an original examination for the position of assistant superintendent of police unless it is shown in some way that the vacancy in that office could not be filled by promotion, and this, we think, the pleas wholly failed to do. The third plea

> does not aver that there were no 'employees of the next lower grade' who could or who were willing to take the promotional examination, nor do we think the plea would have been sufficient if it had so averred. The question, in the promotional examination to fill vacancies, whether there are employes of the next lower grade competent and willing to take the examination, is one which must be determined by the commission under its rules, and cannot be left open to its determination upon each examination to fill vacancies. It is perfectly clear in this case that the examination under which appellant secured his appointment was not made 'public, competitive and free to all the citizens of the United States' because there were no employes in the position of inspectors of police who were competent and willing to take a promotional examination, but because, as is now contended by counsel, the commission construed the act as authorizing such an original competitive examination in every instance."

In the case of *Powell* v. *Bullis*, 221 Illinois, 379, the procedure under the Civil Service Act is recognized and enforced in favor of the petitioner, Bullis, who was a policeman in the City of Chicago and had applied for a writ of certiorari to review the action of the Civil Service Commission in removing him. In the opinion in that case (pages 380, 381) it is said:

> "In that case [*Commissioners, etc.*, v. *Griffin*, 134 Illinois, 330] property rights were involved, hence it is not an authority against the proposition that the writ may issue when only personal rights are involved, and many cases may be found in this and other states where the writ has issued when only personal rights were involved. (*Miller* v. *Trustees of Schools*, 88 Ill., 26; *Merrick* v. *Township Board of Arbela*,

41 Mich., 630; *State* v. *Whitford*, 54 Wis., 150; *Gilbert* v. *Board of Police*, 40 Pac. Rep., 264.) We think the Superior Court had jurisdiction to issue the writ.

"The main reason urged by appellee as grounds for sustaining the judgment of the lower courts is, that the record filed as a return to the writ does not show that Bullis was notified of the time and place fixed by the Civil Service Commission for a hearing upon the charges preferred against him, or that he waived notice of the time and place of hearing by appearing before said Police Trial Board or otherwise. Section 12 of the Civil Service Act provides: 'No officer or employe in the classified civil service * * * shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense.' And Section 1 of Rule 8 of the Civil Service Commission provides: 'The commission shall cause notice in writing to be personally served on the accused, or to be mailed to him at his own address, as shown by the records of the commission, stating the time (which shall not be less than five days after the service of mailing of such notice) and place when and where such charges will be investigated, and shall give the accused an opportunity to be heard in his own defense at such investigation.' The giving or waiver of such notice was clearly jurisdictional (*Commissioners of Highways* v. *Smith*, 217 Ill., 250), and as the court could only determine that question from an examination of the record filed as a return to the writ (*Joyce* v. *City of Chicago*, *supra*), and the record failed to show that Bullis had been notified or waived notice of the time and place of his hearing upon the charges preferred against him, we think the Police Trial Board was without power to hear the charges made against him or the Civil Service Commission to approve the same and order him dis-

charged as a patrolman from the police force of the City of Chicago, and that the trial court properly quashed the proceedings of the commission."

In the case of *McNeill* v. *The City of Chicago*, 93 Ill. Appellate, 124, petition was filed by one of the so-called "holdovers," and, after demurrer, it was held by the court that the petition was valid, and the following language was used in the course of the opinion (page 127):

> "As is seen by the allegations of the petition, which in the consideration of the question here presented must be taken as true, appellant had been continuously a police patrolman of the City of Chicago for more than eight years at the time of the passage of the Civil Service Act, and was acting as such police patrolman at the time the act went into effect in Chicago. He was what, in common acceptance, when speaking of employes or officers of the city who were in service when the Civil Service Act became operative, is known as a 'holdover.'
>
> "In a carefully considered opinion by Judge Tuley of the Circuit Court, reported in the Chicago Law Journal of June 8, 1900, p. 130, in *Mather et al.* v. *Kerfoot et al.*, and other cases consolidated therewith, in which were involved the positions of certain inspectors and captains of police of Chicago, he says: 'The Civil Service Law did not affect the tenure of office or the power or removal of such holdovers. As to all further applicants for positions, and as to filling all vacancies in the civil service, the act was intended to have immediate effect, and to that end the law requires (Sec. 3) that the commission shall classify all the offices and places of employment in such city with reference to the examinations' provided for by the act, except,

however, certain offices and places mentioned in Section 11 of the act. This exception does not apply to police patrolmen. An examination of the act demonstrates that Judge Tuley is correct in his statement above quoted. It is unnecessary to set out the specific provisions of the act. Section 3 also provides that 'the offices and places so classified by the commission shall constitute the classified civil service of such city; and no appointments to any such offices or places shall be made except under and according to the rules hereinafter mentioned.'

"Section 10 of the same act provides that, 'The head of the department or office in which a position classified under this act is to be filled shall notify said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs. * * * The appointing officer shall notify said commission of each position to be filled separately, and shall fill such place by the appointment of the person certified to by said commission therefor, which appointment shall be on probation for a period to be fixed by said rules.'

* * * * * * *

"Appellees also claim that appellant was discharged on March 6, 1898, and because he waited nineteen months before filing his petition for mandamus, that was a sufficient reason for the court to refuse him the relief asked. The very basis of this contention, viz., the discharge of appellant, is not sustained by the record, and therefore the authorities cited in support of the contention, which were cases of discharge, are not applicable. There is no allegation in the petition that appellant was ever discharged. On the contrary, the allegations are positive that he was appointed to the position of police patrolman in 1887, and remained such 'from thence

hitherto.' The allegations that appellant was dropped from the pay-roll, that his name had been omitted and excluded therefrom, and that he had not been paid his salary, fall short of showing a discharge.

"Inasmuch as, according to the petition, appellant has never been discharged from his position as a police patrolman, it is unnecessary to discuss the method by which he could or might be discharged. It is sufficient for the determination of this case that it appears from the allegations of the petition that appellant was duly and regularly appointed a police patrolman, was in service as such when the Civil Service Act came in force, that he has ever since continued such patrolman, has never been charged with any misconduct or dereliction of duty, that his name has been dropped from the police pay-rolls by direction of the police superintendent and continuously excluded therefrom, and appellant deprived of his salary, though he has demanded of the city, the Mayor and Superintendent of Police that his name should be restored to said pay-roll, and that such demand has been refused."

After the demurrer had been overruled the case proceeded in the court below upon answer filed and was finally determined in the Supreme Court of Illinois against the relator's contentions, and is reported as *McNeill* v. *City of Chicago*, 212 Ill., 481.

In the petition now before the court appropriate allegations are made showing the classification of relator, his certification as a municipal officer in the City of Chicago, his having been placed upon the official pay-roll, and, as such, paid for a considerable period of time. All this was done by the Civil Service Commission, an administrative body, acting un-

der authority conferred upon them by the State of Illinois, represented in its Legislature. It is to be accorded due process of law in the protection and defense of this right that the relator is now asking the relief of this court, and at this point we wish to emphasize that after the passage and adoption of the Civil Service Act in Chicago, in the year 1895, that the term and tenure of relator's office was during good behavior, as fixed by the Civil Service Act, *and that no action of the municipality was necessary or required by law upon such subject.* It will, therefore, at once be apparent that whether or not there was any ordinance in existence has no bearing, since relator is seeking his constitutional rights based upon his classification and certification by the Civil Service Commission, and not alone by reason of his original appointment.

It is our contention that the Civil Service Act as passed by the Illinois Legislature intended to, and did, do away with all appointments at the will of the appointing power, *and likewise covered removals at the will of the appointing power.* It cannot be seriously contended that the intention of the Legislature was not to establish a merit system and abolish arbitrary appointments. It being clear that the arbitrary appointments are abolished, it also follows conclusively that arbitrary removals are abolished likewise. If this be not so, then after the adoption of the Civil Service Act we no longer have appointments at the will of the appointing power, but removals in such manner are still retained. Certainly in the absence of language so plainly written that the intent clearly appears, no court would be

justified in placing this construction upon an act which was passed to do away with the abuses theretofore existing with respect to the "spoils system" and appointments given as the reward for political service. Then, too, the Legislature was familiar with the conditions in Chicago and knew that the methods theretofore pursued by which the police department was demoralized and passed this law for the express purpose of putting an end thereto.

Any doubt in this regard is settled forever by reference to the second annual report of the Civil Service Commission of the City of Chicago, being for the year ending December 31, 1896, and addressed to Hon. George B. Swift, then Mayor of Chicago, which said report is printed as an official document. Upon page 15 thereof we find the following:

> "Under the terms of the law, all persons in the employ of the city when the law went into effect became members of the Classified Service by operation of the law. They are protected in their positions during good behavior by the fact that if removed the officer making the removal has no power to fill the vacancy. This is the same measure of protection which is extended by the Federal Civil Service Law to the members of the National Classified Service, and in practical operation during a series of years, has been found ample and effective. It is not probable that wholesale removals will ever again be made in this city, or that removals will be made at all, except for good cause. If good cause does exist in any case, then the removal should be made, and it should be made just the same whether the person was appointed before the law went into effect or afterwards. A change in the municipal administration will fairly test the value of the law, and it is firmly be-

lieved that the restraining influence that it will then exert in the matter of removals and appointments will commend it more strongly than ever to the good opinion of the public.

"The act as it stands, has been pronounced by those most competent to judge, the best law yet passed by any legislature upon the subject of which it treats, and it is believed that it will, if properly enforced, fully accomplish the purpose for which it was enacted."

In the same document, following the copy of the Civil Service Act, as Appendix "G", are found the Civil Service rules and special attention is called to page 54, wherein, under the heading of Official Service, is found the provision for the uniformed police force, being, as we have heretofore said, Division "D" thereunder, and to page 65 covering removals, being Rule 9 thereof, paragraph 1 of which is as follows:

"RULE IX.

REMOVAL.

"1. How Made. The removal of an officer or employe, who has been appointed to the official service in accordance with these rules, can only be made as provided in Section 12 of said act."

By Rule 10, found on page 66 thereof, provision is made for what is known as the "Civil List of the City of Chicago," which is to be kept in the office of the commission and is the official list. We quote as follows:

"RULE X.

"3. Civil List. A list to be known as the 'Civil List of the City of Chicago' shall be kept in the office of the commission, to contain the

name of every person employed in, or receiving compensation in, the Classified Service. The list shall show respecting every officer and employe: The title of his office, the salary or compensation thereto attached, the time he has held such office, the time he has been in the service of the City of Chicago and the places in the service he has filled, a brief specification of the duties of the office, by whom the appointment thereto is made, and the term, if any, of the office.

"4. Payment of Salaries. As provided in Section 31 of said act, no payment or compensation for services rendered, after the taking effect of these rules, can be made by the city, or any of its officers, to a person holding a position in the Classified Service until it appears either that he was employed in such position before these rules took effect, or that he has been employed under the provisions of the same, and is holding his position in accordance therewith."

It has been recognized in the decisions of the courts of this country that upon the adoption of civil service acts those in office and classified need not take the examination required of those seeking appointment after such adoption and in this connection the following cases are cited in support thereof:

Gilbert v. *Board of Police, etc., of Salt Lake City*, 11 Utah 378; 40 Pacific Reporter, 264.

The People ex rel. Wilson v. *Knox et al.*, 61 New York Supplement, 472.

People ex rel. Gorman v. *Police Board*, 35 Barber, 527.

Emmitt v. *Mayor, etc., of New York*, 128 New York, 117.

Larsen v. *City of St. Paul, Minn.*, 83 Minnesota, 473; 86 N. W., 459.

State v. *Wyman*, 71 Ohio State, 1.

In the case of *Gilbert v. Board of Police, etc., of Salt Lake City, supra*, the Supreme Court of Utah, in disposing of the contention therein made, that the Civil Service Act of that state should be so construed as to compel all officers and employes in office at the time of the adoption of the act to take an examination, such as provided for those seeking appointments in the future, said:

> "Such a construction would compel all such employes, at the mere pleasure of the board, to submit either to a removal from service or to undergo the competitive examination provided for in the act for applicants who may be seeking employment; and it appears in this case that the board acted on such construction, for it demanded of the relator that he undergo such an examination as a condition precedent to his continuing in its employ. An examination of the entire act reveals no such legislative intent, and, if there is any doubt as to the meaning of the word 'employed', in Section 6, such doubt is removed by Section 9, for in that section the Legislature expressly provides that: 'Such rules and regulations shall specify the date when they shall take effect, and thereafter all selections of persons for employment, or appointment, or promotion,' etc., shall be made according to such rules and regulations. The provision is for selections to be made thereafter; that is, after the rules and regulations have been adopted. There was manifestly no intention to include among applicants for employment those who were already in the service. Nor was it necesary to so include employes to secure efficiency in either department, because there is ample provision in the act to secure the removal and dismissal of all those who may be unfaithful or incompetent. To compel persons who were in the employ of either department at the

> time of the passage of the act, and who continued therein, to submit to an examination, or, failing so to do, to suspend or remove them from service for such failure, is unwarranted under the law." (40 Pac. Rep., 268.)

The rule above mentioned is recognized in the State of New York in the two cases above cited from that state, and we quote briefly from them.

In *People ex rel. Wilson* v. *Knox, supra*, it is said:

> "The practical purpose to be attained by civil service laws is not only to secure for the public service, but to retain in that service, those who are qualified for the positions in which they are placed by the tests of the law in force at the time of their original entry into service." (61 N. Y. Sup., 473.)

And to the following from the case of *People ex rel. Gorman* v. *Board of Police, supra*, in which after citing the leading case of *People ex rel. McCann* v. *Board of Police*, 19 N. Y., 188, the court proceeds as follows:

> "But he was not appointed by the defendants, the new board of police. He was continued in the performance of his duty as a policeman under the new act and under the new board, by a higher power than themselves, the Legislature of the State, from which authority the new board alone derive the power they possess. It stands undisputed that the relator was in office lawfully on the 15th of April, 1857, when the new law was passed, and also on the 23d of April, 1857, when the new board were organized and held their first meeting." (35 Barber, 529.)

In the case of *State* v. *Walbridge*, 153 Mo., 194; 54 Southwestern, 447; 41 Am. St. Rep., 653, the Su-

preme Court of Missouri, in speaking of the legal rights of the relator, said (54 Southwestern, 449):

> "To the office of policeman, from which he was removed, he had good title. He was in possession, and no one was disputing it. To that office the law attached a monthly salary, to that salary he was entitled so long as the law remained in force, and under it he lawfully held the office. The legal right to the office carried with it the right to the salary. The Board, by its wrongful act, could not deprive him of his legal right. The right of a public officer to the salary of his office is a right created by law, is incident to the office and not the creature of contract, nor dependent upon the fact or value of services actually rendered. (Citing cases from several states.)"

In this case it is interesting to note that by the charter of the City of St. Louis it was provided that policemen could only be removed for cause and after hearing, containing provisions identical with the charter of the City of Chicago. The case just above cited was followed in the case of *Gracey* v. *City of St. Louis*, 213 Mo., 384; 111 Southwestern, 1159, wherein was presented the question whether or not the relator was an officer of the City of St. Louis, and it was decided by the Supreme Court of Missouri that he was, and that court said:

> "It appears, then, that whether our conclusion be drawn from a view of general principles of law, or (more narrowly) be based on a close analysis of the ordinances of this city, we must hold that plaintiff was an officer of the City of St. Louis, and this although the word 'employ' is used in Section 2197."

In the case of *Larsen* v. *City of St. Paul*, 83 Minn., 473; 86 Northwestern, 459, the Supreme Court of Minnesota said (86 Northwestern, 460):

> "There was nothing in the act which looked towards relieving men already on the force, but who would be ineligible to appointment because lacking as to one or more of the enumerated requisites, so the fact might be that men holding these offices at the time of the enactment of the law, and not possessing any of the requirements required thereby, would still continue on duty, and over men who were qualified, but who were not appointed until after the law went into effect. This, in time, would work out in accordance with the spirit of the act. Men of experience and mature years would be appointed to positions as officers, and in the future men who did not possess these special requirements would be ineligible to appointment in the ranks; the result being that, without any serious disturbance in public matters, and without detriment to the service, it would be but a few years before all of the officers, as well as the men, would possess the required qualifications."

In this case it is also decided that the fact appearing that the Mayor of the City of St. Paul had appointed the policeman, the consent of the council was sufficiently indicated by its approving the monthly pay-rolls over a period of years and that no direct action was required. In other words, it was not considered fatal to the policeman's claim that the council had not passed a specific ordinance, so long as it clearly appeared that the council had approved the pay-roll containing his name and thus established its acquiescence.

In the case of *Emmitt* v. *Mayor, etc., of New York*,

128 New York, 117, the unanimous opinion of the New York Court of Appeals is in part as follows (page 120):

> "The office of inspector being one created by the act [Civil Service Act] when filled, the incumbent became more than a mere ordinary employe, or laborer. Besides, it appears that his candidacy for the office must have been certified by a certificate from the Civil Service Commission and his qualifications further certified to by at least three of the aqueduct commissioners. Such an employe upon the work cannot be classified, or regarded, as a temporary or occasional laborer. He fills an office with certain more or less important responsibilities attached to it."

In the case of *State* v. *Wyman*, 71 Ohio St., 1, a petition in *quo warranto* was filed, by the Attorney General of Ohio, to oust the defendant from the office of Chief of Police, of the City of East Liverpool, in that state. The Supreme Court of Ohio ordered the petition dismissed, and in the course of the opinion uses the following language (page 8):

> "The offices, employment and places so classified by the said board of public safety shall constitute the classified service of the department of said city, and no appointments to such places shall be made except under and according to the rules hereinafter mentioned. Immediately upon the classification of such department, such board shall furnish to the Mayor a list of all offices, employment and places in any way connected with such department within said classified service, with the names of the incumbents, their compensation and the nature of their duties; and said board shall from time to time promptly furnish to the said Mayor in writing at his request all other information de-

sired by him for the proper fulfillment of his duties. Section 162 provides for the examination of all applicants for offices or places of employment in such classified service. * * *

"It seems to have been the purpose of the Legislature in the enactment of the code, so far as possible, to provide that officers and employees in the police and fire departments, in office when the new code went into effect, should not be disturbed in their office or employment, and that thereafter these departments should be under the so-called merit system, and that appointments thereto could be made only in the manner provided by the code. * * * It is not difficult to understand why the Legislature, in adopting the merit system, should provide that those already in office might remain without examination, but it does not appear why it also should be provided that a vacancy in the highest office could be filled only from their number. * * * The provision of Section 158 is not that the names of the incumbents shall comprise a classified list, but that the board shall furnish the Mayor a list of the offices and employments within the classified service, and then in order that the persons in office or employment in these departments at the time the new code went into effect, may not be disturbed, it is further provided that the board shall accompany the list with the names of the incumbents; and the reason for the provision in Section 149, that the Chief of Police shall be appointed from the classified list of such department, is that there may not be any doubt of the legislative intent that that office also shall be under the merit system, and that appointees thereto, other than those in office at the time the code takes effect, shall be required to be selected by examination. That section provides that the police department shall be composed of a Chief of Police, and such other officers as may be provided by ordinance

> of council, and it well might be contended that it was not necessary for council to provide by ordinance for the office of Chief of Police, that such office was provided for by the statute itself, and that, therefore, that office would not necessarily come under the merit system."

In the case of *Eckloff v. District of Columbia*, 135 U. S., 240, the plaintiff in error was removed from the police force by the commissioners of the district without any written charges preferred against him, or any notice or hearing. The single question presented was as to the power of the commissioners to so remove a police officer and the justification for such action was found in an act of Congress which placed the police force under the control of said commissioners and empowered them

> "To abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office and make appointments to any office under them authorized by law."

This court held in that case that this general language gave full and complete powers of removal, and in the course of the opinion it is said:

> "The power to remove is a power without limitations. The power is granted in general terms, as well as the authority to adopt such provisions as may be necessary to carry it into execution. Full authority is given to the commission; and in the absence of rules and regulations directing a definite procedure, its act of summary dismissal cannot be challenged."

This case is another instance of the necessity for positive provisions of law to permit removals without notice and hearing. It is needless to say that

if statutory warrant had not been found in the act of Congress, providing a permanent government for the District of Columbia, this court would not have held that the removal was legal. In the case at bar there is no statutory warrant for the removal of the relator, and in the absence of such clear, positive and mandatory enactment he was entitled to notice and hearing under the Constitution. Again we wish to emphasize that the error into which the state court has fallen is in holding *that the absence of specific mention of the right to have notice and a hearing, from the provisions of the Civil Service Act*, prevented relator from being entitled to notice and hearing, whereas the law is that these rights must be granted to him unless by positive enactment they are taken away, as said by Chief Justice Marshall, "under the mandate of positive law." The Civil Service Act clearly repealed all former laws on the same subject, as was decided in the state court in *The People v. Kipley*, 171 Illinois, 44. There was, therefore, no statutory warrant for the summary removal of relator at the time such removal was attempted by the Superintendent of Police.

By the terms of the Civil Service Act, relator was entitled to notice and hearing and could only be removed or discharged for cause. The language of the statute is as follows:

> "§12. No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense."

This language means to include all within the classification, since, by the terms of Section 3 the offices and places of employment so classified are made the classified civil service of the city. The words "who shall have been appointed under said rules and after said examination," do not amplify or limit the words preceding them, but are meant to describe (a) those who shall have been appointed and (b) those who have passed the examination. The language of Section 3 is prospective in operation, since there is no intent evidenced to abolish any offices or place of employment. Furthermore, the "uniformed police" are classified as officers under Division "D" of Class "A". Relator was, therefore one of the classified civil service. Section 12 regulated his removal by express terms, so clear and plain that this conclusion is irresistible. The word "shall" refers to the future and cannot have any application to the officers holding their positions when the act was adopted. This is the only construction that will render the rules of the commission and the statute of the state harmonious.

That "examinations" and "appointments" were not contemplated by the act as necessary to be made, after the adoption of the act by the City of Chicago, before the police force of the city would be entitled to the protection afforded by the act, is manifest not only from the words of the act, *but also from the necessities of the case*. If the contention of counsel for the city, that no policeman is entitled to the protection of the Civil Service Act until he has been "appointed" after the examination provided by the act, and that until such ap-

pointment is made, any *one* or *all* of the police force may be *summarily discharged* at the pleasure of the Superintendent of Police, what protection would the city have from the danger incident to a discharge by such official, immediately upon the adoption of the Civil Service Act, for political reasons, of the *entire* police force, instead of being content, as he was, with the discharge of a *few hundred* only?

The act contemplated that, after its adoption by the city, civil service commissioners should be appointed by the mayor; and that after the commissioners had been appointed they should make *rules* for the examination of those seeking appointment upon the police force; and that such examinations should be made, and if an applicant for examination should be found qualified, and a vacancy existed, he might be appointed. This would necessarily take some time, and possibly very much time; for no one could be examined unless they desired to obtain a position on the force, and it would be possible that no one would apply for such position for weeks and even months; and can it be supposed for a moment that the Legislature contemplated that the City of Chicago was to be without its necessary police force until there should be found two or three thousand persons who not only *desired* to take the prescribed examination, but who should be found *qualified* and could succeed in having themselves "appointed" to the office of policeman? Such result might follow if the untenable claim made by counsel for the city of Chicago (that no one since the adoption of the Civil Service Act can be a policeman of Chicago, entitled to the benefits of the act, unless he

has been "*appointed*" after examination in accordance with the rules adopted by the Civil Service Commission) is held to be sound.

We conclude the matter now under consideration with a few words of general comment upon the Civil Service Act.

This act was adopted by the City of Chicago April 2, 1895, and under the provisions of law the then mayor of the city, on July 1, 1895, issued his proclamation declaring the adoption of said act. It was adopted by an overwhelming vote of the citizens of the City of Chicago. It is a statute in the highest sense remedial in its character. It was aimed at the overthrow of the "spoils system," so-called, which had grown to be an intolerable evil. The very purpose of the act was to bring to an end the use of the public offices of our great municipalities as the "spoils" of political supremacy. Historically, everyone knows that this motive was controlling with the electorate in voting for the adoption of the act. An act which has been so adopted should, pre-eminently, receive such construction by the courts, if not absolutely in conflict with the express provisions of the act itself, as will most completely give effect to the purpose of the act, and the expressed will of the people. There was no purpose on the part of the electorate, when the Civil Service Act was adopted, and became the law of the municipality of Chicago, with reference to the organization and control of its civil service, that the power of arbitrary removal of faithful, efficient, tried "holdovers" should remain as a weapon in the hands of politicians for the furtherance

of their purposes, or the discharge of their political obligations. This is historically certain. But it is equally certain from an inspection of the act itself, that the act had no such purpose in contemplation; on the contrary, the very object of the act was to forever end the system which had become a stench in the nostrils of honest people, and a growing menace to the efficiency and perpetuity of our institutions. As was said by Judge Tuley in the *Ptacek* case:

> "Not only in this city, but in all large cities of the United States, the politicians have shown antagonism to all Civil Service laws. This is the people's law and not the politicians'; and unless those chosen to enforce it shall enforce it in its spirit and letter, it will soon become another of the many cases where the people have attempted to reform evils in Civil Service and failed in their efforts to do so."

It was held by this court in *Garfield* v. *United States*, 211 U. S., 249, as follows:

> "It has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard. The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of the essence of due process of law."

To the same effect is the more recent case of *United States ex rel. Turner* v. *Fisher*, 222 U. S., 204. There can be no doubt that the Civil Service Commission was authorized and empowered by the legislature of Illinois to classify all offices and places of employment in the City of Chicago and

that such offices and places of employment should constitute the Classified Service of said city; that acting under and by virtue of said act, the commissioners appointed by the Mayor of said city did classify the offices and places of employment therein; that by such classification Class "A" was known as the Official Service and that Division "D" thereunder was the Police Service, consisting of all persons in the uniformed police force; that such offices were made up into what is known as the Civil List, and that the city was unauthorized to make payment to anyone not appearing upon said list. The allegations of the petition, admitted as true by the general demurrer, show that relator was one of the uniformed police in the City of Chicago at the time of the adoption of said act, was classified thereunder, his name was placed upon the official "Civil Service List," this list was certified and he was paid for several years by the City of Chicago. By this "administrative proceeding" did not relator acquire any rights? If he did, he has been deprived of them without due process of law, because no notice of any charges were ever preferred or made known to him and he was given absolutely no opportunity of being heard in his defense.

We have indicated by reference to the report of the Civil Service Commission that the act was founded substantially upon the Federal Civil Service Act and decisions with reference to such act will be of interest and instructive in deciding the matter now before this court.

This court decided in the case of *United States* v. *Wickersham*, 201 U. S., 390, that a stenographer

in the land office in Idaho, though perhaps not technically an officer of the United States, with a fixed term and compensation, was nevertheless entitled to the protection and benefit of an order of the President of the United States governing removals where the facts showed that the Secretary of Interior had certified his name to the Civil Service Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the executive order. We quote the following from the opinion in that case (page 397):

> "On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the Acting Secretary of the Interior filed a list of positions and employes with the Civil Service Commission, which, among others, in the list of employes in the offices of surveyors-general, contained the name of the appellee as a stenographer and typewriter, the date of his appointment, salary and residence, as stated in the findings of fact. By the action recited on the part of the President and the head of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified Civil Service. **While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the 'employes outside the District of Columbia,' covered by the President's order of May 6, 1896. That order expressly included officers and employes, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Serv-**

ice Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the Executive order. He was therefore entitled to the protection of the President's order of July 27, 1897 (14 Ann. Rep. Civ. Serv. Comm., 133); 'no removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.'

"If the contention of the Government be correct and the attempted suspension by the surveyor-general was equivalent to a dismissal from office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; nor can we find any authority, statutory or otherwise, authorizing the suspension in the manner undertaken in this case."

II.

We contend that the office of Police Patrolman, in the Police Department of the City of Chicago, was created by act of the Legislature, revising the charter of Chicago in 1863, and that the office was not abolished by the cities and villages act, and the reorganization of the municipality of Chicago under that act.

In the case of *Stutt v. City of Chicago*, 205 Illinois, 281, the Supreme Court of Illinois, in discussing the sufficiency of the allegation of the petition, that relator was "duly appointed" a police patrolman (page 290), said:

> "*If the office of police patrolman had been one provided by statute or some general law of which it was the duty of the court to take judicial notice*, then there is authority for holding that the word 'duly' means in a regular and legal manner, or as said in some of the cases, 'in the proper way; regularly; according to law;' * * * * It may be *if appellant were an officer of the city or of* the county whose election or appointment is expressly provided for by *statute*, that the allegation that he was duly appointed might be regarded as sufficient by the courts."

The court, by the use of the words italicized in the above quotation, as also by other portions of the opinion, evidently had *overlooked the fact* that the office of police patrolman had been created by direct legislative action.

The *original charter* of Chicago (Laws of Illinois passed at the session of the Legislature ending March 6, 1837), recognizes the existence of a police force in said city, and the *Common Council*, by paragraph 30 of Sec. 28 of the charter, were given power "to regulate the police of said city." Such police were by said original charter called *police constables*.

The act to *revise* the charter, approved February 13, 1863, which act was expressly declared to be a *public act* (Sec. 13, Chap. 17), not only recognized

established an "*executive department* of the municipal government of said city to be known as the Board of Police," which board was given "the entire control of the *police force* of said city," etc. Not only was the police force of the city recognized, and the control thereof vested in a Board of Police, but the act provided in terms what officers should constitute the force, to-wit:

> "The said police force shall consist of a superintendent of police, three captains of police, six sergeants, *ninety police patrolmen*, and as many *more* police patrolmen, sergeants and deputy superintendents as may be authorized by the common council on the application of the board. *The several offices hereby created* shall be severally filled by appointment," etc.
>
> See Chap. 10 of said Act (Laws of 1863, p. 109).

The charter was again revised by an act, approved February 16, 1865, which act was also declared to be a *public act*. This act may be found in Vol. 1 of Laws of 1865, commencing at page 284. This act, as did the original charter, and the revision of 1863, recognized the existence of the police force and of the Board of Police, and fixed the salaries of the various officers composing said force. By this revision (Sec. 15, p. 288) the Legislature declared:

> "That said force shall consist of a general superintendent of police, one deputy superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many police patrolmen, not exceeding two hundred, as may be authorized by the Common Council," etc.

The acts of the Legislature above referred to show very clearly that the City of Chicago had, from *the beginning of its existence as a municipality*, a police force—the various offices in which force were created by the direct action of the *Legislature* itself.

In the case of *Ballis* v. *City of Chicago*, 235 Illinois, 472 (an assumpsit suit decided against the plaintiff because a resolution of the Council was held not an ordinance), the Supreme Court of Illinois goes further than the court had theretofore gone and in terms (page 476) holds:

> "Until the City Council did provide for the appointment of patrolmen, the provisions of the city charter having been superseded by those of the general law, **there was no such office as patrolman.**"

In the opinion (page 474) preceding the above quotation, there is an admission that by *the provisions of the city charter* there *was* such an office as patrolman. It is, however, assumed that such office ceased to exist upon the adoption, by the people of Chicago, of the Cities and Villages Act, because, as the court says, the provisions of the charter were "*superseded*" by those of the general law.

In this assumption we believe the court has erred. The adoption of the Cities and Villages Act was not designed to, and did not, supersede all prior acts of the Legislature pertaining to the municipality. On the contrary, the Cities and Villages Act expressly provides (Section 6, Article 1), that

> "*All laws and parts of laws, not inconsistent* with the provisions of this act, *shall continue in*

> *force and applicable to any such city* or village, the SAME AS IF SUCH CHANGE OF ORGANIZATION HAD NOT TAKEN PLACE."

Is a law *creating* a *police force* in the City of Chicago "inconsistent" with the provisions of the Cities and Villages Act? Manifestly not, for the Cities and Villages Act itself *recognizes the existence* of a police force, and confers upon the City Council power "*to regulate the police* of the city," and power "to prescribe the duties and powers of a *superintendent of police, policemen and watchmen.*"

The *creation* of the office of superintendent of police and policemen had been performed by the Legislature by its direct act, as we have already seen; hence, when the Cities and Villages Act refers to the police force and the *power* of the City Council *in connection therewith*, no power is conferred upon the Council to *create* the office of policeman, but there was conferred simply power to *regulate* the force which *had been* created, and to prescribe the *duties* of such force.

As was said by the Supreme Court of Indiana in *Roth et al. v. State of Indiana*, 158 Indiana, 243; 63 Northeastern Rep., 460:

> "To *create an office*, and merely to provide for *filling the same*, or for *regulating* the *duties* or *functions* thereof, are quite different. As affirmed by the authorities, the word 'create' has a clear, well-settled and well understood signification. It means to bring into existence something which does not exist."

The Legislature by its direct action *created* the office of policeman, as shown by the acts hereinbefore referred to; and by the Cities and Villages Act the Legislature empowered the City Council to regulate the conduct of those who should hold such office. These acts, so far as the *office* in question is concerned, are, as we have seen, in no sense *inconsistent*, and hence the former acts, *creating* the office of policeman in the City of Chicago, are still in force, and such an *office* does exist independently of action by the City Council.

Additional force is given to this construction of the statute by the peculiar wording of the clause of the Cities and Villages Act, conferring power upon the City Council in respect to police matters. The power conferred is "*to regulate the police*"—not power to regulate the *members of a police force*, should the Council see fit to *create* such force at some future time—but power to regulate *the* police force. This *specific* reference to "*the* police" of the city necessarily implies that the Legislature understood that there was *then existing* in the City of Chicago *a department of the municipal government known as the department of police* embracing officers commonly known as superintendent of police, captains of police, lieutenants, sergeants and police patrolmen—and *those* officers the City Council was empowered to *regulate*.

But it is said that by Section 2 of Article VI of the Cities and Villages Act, the City Council was given power to provide for the election by the legal voters of the city, or the appointment by the Mayor of certain specific officers, "*and such other officers*

as may by said Council be deemed necessary or expedient"—and it is *assumed*, by the state court, that the phrase "*other officers*" referred to in this provision of the act refers to *police* officers, and, hence, it was held by that court that until the City Council does provide for the *election* or *appointment* of *police* officers, no such office or officer has any existence in the City of Chicago.

In giving this construction to the statute in question we believe the state court has erred.

That the "laws and parts of laws" pertaining to the police force in the City of Chicago, to which we have referred (the original charter of the city and the revisions thereof enacted in 1863 and 1865), are not "*inconsistent*" with the power to provide for the election or appointment of the "*other officers*," conferred by said Section 2 of Article VI, certainly does not appear *upon the face* of the provision in question. It is not stated in said Section 2 *what* officers are to be included in the term "such other officers"; but inasmuch as the Legislature had already *created* a *police* force for the City of Chicago, and had by earlier provisions of the Cities and Villages Act provided that the acts creating such police force, if not "*inconsistent*" with the Cities and Villages Act, should "*continue in force and applicable* to" the City of Chicago, "*the same as if such change of organization had not taken place*"; and inasmuch as the Legislature, by the Cities and Villages Act itself, had, by a section of said act, placed earlier in the act than said Section 2, recognized *the* police force theretofore created as still in existence, and had conferred upon the City

Council power to regulate such force—is the assumption that the "*other officers,*" referred to in Section 2, were *police* officers, warranted? And is the assumption warranted, that the provision of Section 2, conferring power upon the City Council to provide for the election or appointment of such "*other officers,*" is "*inconsistent*" with the prior laws of the Legislature *creating* "*the police*" of said city, and for that reason such prior laws are superseded?

As has been before said, it was held by the state court that until the City Council takes action under the authority conferred upon it by said Section 2, and provides for the *election* or *appointment* of policemen, no such office or officer exists in the City of Chicago.

Let us consider the *effect* of this construction thus given to the provision of Section 2, now under consideration.

First: The adoption by the people of the city of Chicago, of the act in question, would at once wipe out and destroy all action of the Legislature theretofore taken for the protection of the people of that part of the state residing in Chicago, and of the people of this state, and other states, who might have occasion to visit Chicago.

Second: The adoption of the act would make the matter of providing such protection, at any time in the future, dependent upon the "discretion" of the City Council—dependent upon whether or not such City Council should *deem such protection* "*necessary.*"

Third: The City Council, if it should at any time

deem such police protection necessary, and provide for the election or appointment of *police* officers, it might "*discontinue* any office so created."

The Legislature in 1863, acting in the interest and for the protection of the people of the state, thought it necessary to secure police protection for them, and, to that end, it provided that—

> "The police force [of the City of Chicago] *shall* consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and *as many more* police patrolmen, sergeants and deputy superintendents as may be authorized by the Common Council."

Later, in 1865, the Legislature, for the further protection of the people, in some respects, increased this force.

Now it is insisted that by the adoption of the Cities and Villages Act, by the people of Chicago, all police protection theretofore provided for the people of the city and state, by the Legislature, *eo instanti*, ceased to have an existence, and the people of the city and state were to be thenceforth dependent upon the "discretion" of the City Council to create a police force which it might or might not create—as it might or might not deem such police force "necessary or expedient." And it necessarily follows, that if such *City Council* should deem it *unnecessary* to have *any* police protection at all, the people would be remediless in the premises, inasmuch as the power to provide such police protection was not by the act made *obligatory* upon the City Council, but rested solely on the "discretion" of the City Council, there being, in such

case, no power in the courts to coerce the City Council into providing for such police force. And should the City Council, at any time in the future, become so unmindful or indifferent to the necessities of the people for police protection as to neglect or refuse to provide for the election or appointment of a police force in said city, it is not apparent to us, if this construction of Section 2 is to be adhered to, that the people would have any remedy, in the law, for such want of action by the City Council in the premises, but would be obliged to resort to *force* to compel the Council to *create* the office of policeman, and provide proper police protection.

We respectfully insist that the office of policeman in the city of Chicago, after as well as before the act of the Legislature, passed prior to the Cities and Villages Act, and continued in force by that act, still existed, and that any construction of said Section 2 which would give to that section the effect of repealing or superseding prior laws creating and continuing a police force in the city of Chicago, after as well as before the reorganization of said municipality under the Cities and Villages Act, *must* be erroneous.

In passing upon the contention which we have now made as to the effect of Section 2, as repealing or superseding the prior laws and parts of laws *creating a police force in the city of Chicago*, and the continuance in existence of such force after the adoption of the Cities and Villages Act, we trust that this court will not only consider the suggestions made, but will bear in mind that statutes are not repealed by *implication*, unless such implication is

so clear as to make it *certain* that it was the intention of the Legislature that the prior act should be repealed by the later one.

Upon this branch of the argument, we will conclude by making a single statement of *fact* (one which cannot be successfully denied by the attorney or counsel for the city of Chicago), and a statement of law based upon that fact. The statement of fact is this: *The City Council of the City of Chicago has never passed any ordinance creating the office of a police patrolman in said city.* The statement of law is this: *If the views of the state court are correct, there is not a police patrolman de jure in the City of Chicago to-day; and there being no such office as police patrolman, there is not a police patrolman de facto in the City of Chicago to-day—and the city* is left, and now is entirely without *legal* official police protection—the only protection it has being by employed individuals, possessing no *official* power or authority whatever.

If we are correct in our position that the "other officers" referred to in Section 2 of Article VI of the Cities and Villages Act are not officers of police, but that the police force in the City of Chicago was provided for by a prior act of the Legislature, and that said prior act, so far as related to the police, was by the express provisions of Section 6 of Article I of the Cities and Villages Act continued in force, it necessarily follows that the provisions of such prior act prescribing the *term of office* of the incumbents of the office thereby created were carried forward and continued with the continuance of

the office under the reorganization of the municipality.

Referring to the revision of the charter of the city of Chicago, made in 1863, we find that the Legislature provided that the several persons composing the police force created by said revised charter should hold office "during such time as he shall faithfully observe and execute all rules and regulations of said boards and the laws of the state and ordinances of the city." By the further revision of the charter, made in 1865, it was also provided that "each patrolman, as well as each sergeant, so appointed, shall hold office only during such time as he shall faithfully observe and execute all the rules and regulations of the board, the laws of the state and ordinances of the city." By said revisions, respectively, it was provided that:

> "No person shall be removed therefrom [the police force] except upon *written charges* preferred against him to the Board of Police, and *after* an *opportunity* shall have been afforded him of being *heard* in his defense."

It is suggestive to notice that by the terms of the original charter of the city of Chicago, in force March 4, 1837, it was provided that the common council should have power not only "to *regulate* the police of said city," but power to "*remove* all such persons or officers *at pleasure*." But the Legislature, as we have already seen, in revising the charter in 1863, deemed it wise to take from the council the power of *summary removal* theretofore vested in it, and to provide that each member of the police force should hold office "during such time as he shall

faithfully observe and execute all the rules and regulations of said board, *the laws of the state* and the ordinances of the city."

By Section 2 of Article VI of the Cities and Villages Act, power was conferred upon the City Council to "discontinue," at the end of any fiscal year, the offices which by said section the council was empowered to *create*. Is it to be presumed that the Legislature intended to empower the city council to *discontinue* the office of policeman, an office which the Legislature itself had not only created, but the *term* of which office it had fixed, *not in years*, but for *such period* as the incumbent should "faithfully observe and execute the rules and regulations of the board, the laws of the state and the ordinances of the city"? If such presumption is unsound, then we cannot *presume* that the "other officers" referred to in said section was intended to include the officers of the police force.

By Section 3 of said Article VI the method of appointment of certain officers is provided for, and the *city council* is *empowered* to fix the *term of office* of "all such officers," *provided* that such term shall not exceed two years. Is it to be presumed that by "all such officers" the Legislature meant to include police officers? To warrant such presumption we must not only hold that the prior acts of the Legislature creating the office of policeman in the city of Chicago were repealed, but we must also hold that the policy of the law in respect to the removal of police officers from their office as viewed and expressed by the Legislature in revising the charter of the city of Chicago in 1863 and 1865, had so changed

during the seven years following 1865, as to induce the Legislature in 1872 to empower the city council not only to limit the term of office of policeman to any period less than two years, however short that period might be, but to empower the city council to "discontinue" the office altogether, so that such discontinuance was made at the end of any fiscal year.

It will not be contended that an *intention* on the part of the Legislature to legislate in a certain way upon any given subject, has the force of a legislative enactment, even though such intention to legislate is manifest from acts actually passed, unless it does *in fact* pass an act containing apt words to express the intention. In other words, even though we may believe the Legislature *intended* to enact certain laws, yet if it *did not* enact the law intended, the *intention to legislate* in a certain way cannot be taken *as an enacted law*. This court will look in vain for any provision in the Cities and Villages Act limiting the term of office of a policeman in the city of Chicago.

We have before stated that the City Council of Chicago has never by ordinance attempted to *create* the office of policeman; and we now state without fear of contradiction that the City Council of Chicago has never attempted, by ordinance or otherwise, to fix the *term of office* of a police patrolman.

In the case of *Brennan et al.* v. *The People ex rel. Kraus et al.*, 176 Illinois, 620, the court, speaking through Mr. Chief Justice Carter, beginning at page 625 thereof, said:

> "It is conceded, and is clearly true, that when the city was under the special charter, enacted,

approved and in force February 13, 1863 (Private Laws of 1863, p. 40), the Board of Education was one of the departments of the city government; but the position of appellant is, that substantially all of the provisions relating to schools in the Act of 1863, and subsequent amendments, were repealed by the General School Laws of 1872 (Laws of 1871-72), and 1889. (Laws of 1889, p. 239.) In 1875 the City of Chicago became incorporated under the general law for the incorporation of cities and villages, and its special charter is no longer in force, except so much of it as is not inconsistent with the general law. It is provided in Section 6 of Article 1 of said General Law (Laws of 1871-72, p. 218; 1 Starr & Cur. Stat., 454), that 'all laws or parts of laws not inconsistent with the provisions of this act shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place.' Now, the general law for the incorporation of cities and villages contained no provision whatever relating to schools. [**Neither did the said law for the incorporation of cities and villages contain, nor does it contain, any provision whatever relating to the police department of the City of Chicago.**] It is plain, therefore, that its adoption by the City of Chicago did not abrogate any of the provisions of its special charter relative to schools. [**It did not abrogate any of its special charter relative to the police department of the City of Chicago.**] * * * It is not contended that they were **expressly repealed, but by implication only**, as being inconsistent with such general laws. **We are of the opinion that the repealing sections of the Acts of 1872 and 1889**, and the language used in other sections of the **acts, indicate an intention not to repeal any parts of the special acts except such as were inconsistent with the general acts.** The language of

said sections, after naming the statutes repealed, is: 'And all other acts and parts of acts inconsistent with this act, and all general school laws of this state, are hereby repealed. * * * It does not appear to us to be necessary in this case for us to assume the labor suggested by counsel, but in addition to what has already been said it seems to us sufficient to say * * * that the school law of 1872 did not create the Board of Education of Chicago, but recognized its then present existence.' [**Said general law for the incorporation of cities and villages, 1872, adopted by the City of Chicago in 1875, did not create the department of police in said City of Chicago, but recognized its present existence.**]"

In the case of *City of East St. Louis* v. *Maxwell*, 99 Ill., 439, at page 444 thereof, the court, speaking by Mr. Justice Craig, said:

"The Act of 1872 is a statute of a general nature, and such statutes do not repeal by implication, charters and special acts passed for the benefit of particular municipalities. (Dillon on Municipal Corporations, Sec. 54.)

"*Town of Ottawa* v. *County of La Salle*, 12 Ill., 340, is an authority in point on the question involved. It was there held, that a subsequent law which is general, does not abrogate a former one which is special. Nor does a general law operate as a repeal of a special law on the same subject."

In the case of *Gunnarshon* v. *City of Sterling*, 92 Ill., 569, at page 573 thereof, the court, speaking by Mr. Justice Scholfield, said:

"The rule is, a subsequent statute which is general does not abrogate a former statute which is particular."

Furthermore, it is our contention that, as to the question now before the court, to-wit: The provision in the charter of 1865, "*That no person shall be removed therefrom, except upon written charges preferred against him by the Board of Police, and after an opportunity shall have been afforded him of being heard in his defense,*" it is not inconsistent with any provision found in the City and Village Act, but that the inconsistency, if any there be, is between the above quotation from the charter of 1865 *and an ordinance of the City of Chicago, passed in 1881.* It certainly cannot be urged with any hope of success that a special statute is repealed by an inconsistent city ordinance. And, furthermore, how could the Supreme Court of Illinois take judicial notice of an ordinance which was not pleaded? The situation being as we have heretofore stated, that the hearing was upon demurrer, no one will have the temerity to say that any such alleged inconsistency appears from the allegations of relator's petition. The Legislature of Illinois, in 1865, saw fit to include the above quoted provision in the charter of the city of Chicago of 1863. This provision is again found in the Civil Service Act of the same Legislature passed in 1895, and there is nothing inconsistent therewith in the City and Village Act of 1872, adopted by the city of Chicago, in 1875. There is not one word inconsistent with the language above quoted. And what plausible argument can be made that the State of Illinois ever intended that policemen could be removed from the police force without notice and a hearing in their defense? We say again with con-

fidence that whatever regulations the City Council of Chicago may have made, there was no power in that body to do away with the proviso in the Act of 1865. This, to our mind, is so clear that this court is justified in so holding, irrespective of the fact that the state court has arrived at a different conclusion, as has been held by the decisions of this court. By the terms of the City and Village Act, all laws *and parts of laws* "not inconsistent with the provisions of that act" should "continue in force and be applicable to any such city or village the same as if such change of organization had not taken place."

III.

In the case at bar the agents of the State of Illinois did not act in accordance with the laws of that state and hence deprived relator of his rights illegally.

This case is distinguishable from cases like *Wilson* v. *North Carolina*, 169 U. S., 586, for this reason. The mere fact that the state court has construed the laws of Illinois, erroneously, as we contend, is no ground for defeating the jurisdiction of this court. It is so palpably erroneous that this court cannot disregard our contentions without working the most manifest injustice. We ask for no reversal of previous decisions by this court, but an adherence to the principles of what has often been decided. If the judgment of the state court can be affirmed in this case, then, we submit, there is no vital force in the Fourteenth Amendment, as a restraint upon

the action of the agents of a state. It is not the policy of this tribunal to overlook the violation of fundamental rights. *Let it be conceded that the laws of Illinois give to relator every right he claims,* then the mere fact that the highest court of the state has decided adversely to his contention cannot defeat the right and duty of this court to determine for itself what are those rights and whether they have been violated. We trust that we have demonstrated that the laws of Illinois do give the rights claimed by relator.

Even if the State of Illinois has the power to enact that police officers can be removed without notice and hearing (a question not necessary for decision in this case), that state has not so provided in its constitution or statutes. The provisions of the Fourteenth Amendment, therefore, require that the fundamental safeguards of citizenship be not denied.

As was said by Chief Justice Marshall, in the case of *Meade* v. *Deputy Marshal*, 1 Brock, 324:

> "It is a principle of natural justice, which courts are never at liberty to dispense with **unless under the mandate of positive law**, that no person shall be condemned unheard or without an opportunity of being heard."

The facts in the petition now before the court present no review of a procedure deemed the equivalent of due process of law, to-wit, notice and hearing. The only possible escape from the conclusions we have urged, presented by our opponents, is that there is no such thing as a policeman in the City of Chicago. This position, we submit, is so untenable that no court would be justified in upholding it. Con-

trast this view with our contention—that relator acquired rights under the Civil Service Act and the classification and certification thereunder, and is entitled to notice and hearing as to those rights before they are arbitrarily and ruthlessly taken from him, within the shadow of an enlightened civil reform statute. Can these things be done without violating the Federal Constitution? Never, we submit, so long as there exists the power in this court to review such action.

There is nothing in the Civil Service Act to warrant any such conclusion. The sole justification is that such statute does not in express terms provide these fundamental safeguards. The point is that such statute does not attempt to take away these rights. Where is the mandate of positive law requiring it?

In *Yick Wo* v. *Hopkins*, 118 U. S., 356, after stating that judicial propriety is best served by accepting the judgment of the state court as to the illegality of the imprisonment of the petitioner, this court said (page 366):

> "That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction; for the determination of the question, whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

And this court immediately proceeded to differ from the state court upon the real meaning of the ordinances in question. In the case at bar we have statutes instead of ordinances, but the real meaning is no less clear and distinct. There is nothing in this case to prevent this court from putting an independent construction upon these statutes.

In the course of the opinion in the case just cited we find the following language (page 373):

> "Whatever may have been the intent of the ordinances as adopted they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioner, as to all other persons, by the good and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York*, 92 U. S., 259; *Chy Lung* v. *Freeman*, 92 U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal* v. *Delaware*, 103 U. S., 370; and *Soon Hing* v. *Crowley*, 113 U. S., 703."

IV.

Plaintiff in error was deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen.

As we have said, there is nothing in *Wilson* v. *North Carolina, supra*, that militates against our contentions. In that case this statement, from the case of *Allen* v. *Georgia*, 166 U. S., 138, 140, is quoted with approval, as it is likewise quoted in *Hovey* v. *Elliott*, 167 U. S., 409, 443:

> "To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that if the Supreme Court of a state had acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

But we must bear in mind that in the Wilson case a hearing was provided the plaintiff in error. It is said, therein, after reviewing *Kennard* v. *Louisiana*, 92 U. S., 480, and *Foster* v. *Kansas*, 112 U. S., 201, as follows:

"Neither case gives any support to the claim that such a hearing as was given in this case would be insufficient under the Fourteenth Amendment."

At the conclusion of the opinion it is said:

"The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain the party aggrieved would be deprived of his life, liberty or property, in violation of the provisions of the Federal Constitution."

The case at bar is not a proceeding in *quo warranto*, nor is it based upon the claim that the state government in Illinois is not republican in form. Relator raises no political question—he has had unpleasant experience with politics. *But he does show, in our opinion, "a departure from the fundamental principles upon which our government is based."*

It is valuable in this connection to trace the further development of the principles above mentioned, in the decisions of this court, after the *Wilson* case. The result of our examination and research has developed that nowhere has this court ever given its approval to an administrative or judicial proceeding which denied fundamental rights.

In the case of *Louisville and Nashville Railroad Company* v. *Schmidt*, 177 U. S., 230, this court, on page 236 thereof, after referring to the familiar rule that the Federal Constitution does not require any particular form of procedure in the states and

does not give the power to regulate such procedure, the statement is made that "sufficient notice and opportunity to defend" are required in any method of procedure if it shall furnish due process of law. We have no hesitation in saying that, in our opinion, the *Wilson* case could not have been decided as it was, if this court had not considered that the notice and hearing therein provided was sufficient. The opinion, by Mr. Justice Peckham, in the *Wilson* case clearly indicates this. In this connection it is interesting to compare the dissenting opinions of Mr. Justice Brewer and Mr. Justice Harlan in the case of *Taylor* v. *Beckham*, 178 U. S., 548, 582, 596, 597.

In *Iowa Central Railroad Company* v. *Iowa*, 160 U. S., 389, decided before the *Wilson* case, this court stated (page 393), after considering the state procedure therein presented, that the same satisfied the requirements of the Feedral Constitution:

> "Provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

This language is cited with approval in *Cincinnati Street Railway Company* v. *Snell*, 193 U. S., 30, 37.

In the case of *Rogers* v. *Peck*, 199 U. S., 425, 435, after stating that the state need not provide a jury trial, or furnish an appeal, this court said:

> [The Fourteenth Amendment.] "Does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and adequate opportunity to defend himself in the prosecution."

We have alluded and referred to the *Wilson* case on the one hand and *Yick Wo* v. *Hopkins, supra,* on the other hand, as being characteristic of each side of the question, and, in our opinion, the case at bar falls in the same category with the arbitrary action condemned in the case of the poor Chinese laundryman, rather than in that of the Railroad Commissioner, who had been removed by the Governor of a sovereign state, strictly in accordance with the statutory law of his state, and then, too, his action was subject to confirmation by the Legislature itself.

Another illustrative case is that of *Simon* v. *Craft,* 182 U. S., 427, 437, wherein this court has said:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceeding in which notice is given of the claim asserted and an opportunity afforded to defend against it."

To conclude this part of our argument, we quote from the very recent decision of this court in the case of *Jordan* v. *Massachusetts,* 225 U. S., 167:

> "Subject to the requirement of due process of law, the states are under no restriction as to their method of procedure in the administration of public justice. That the court had jurisdiction and that there was a full hearing upon the issue made by the suggestion of the insanity of the juror is not questioned. 'Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law * * * this court has, up to this time, sustained all state laws, statutory or judicially declared,

> regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.' *Twining* v. *New Jersey*, 211 U. S., 78."

Near the end of the opinion in this case is the following:

> "When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its method of procedure is substantially unrestricted by the due process clause of the Constitution."

There are limits beyond which the state courts cannot go in adjudicating as to the rights of its citizens, and in this connection the following cases are authoritative:

> *Chicago, Burlington, etc., Railroad* v. *Chicago*, 166 U. S., 226.
>
> *Fayerweather* v. *Ritch*, 195 U. S., 276, 297.
>
> *Davidson* v. *New Orleans*, 96 U. S., 97.

This court has often spoken as to what rights are included in the Fourteenth Amendment and what due process of law requires upon the part of the states. Fundamental rights are so uniformly and clearly recognized and enforced in these precincts that we will refer only very briefly to a few expressions of authority bearing thereupon. In the case of *Howard* v. *Kentucky*, 200 U. S., 164, 173, this court said:

> "It may be admitted that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights. What

those are cannot ever be the cause of much dispute."

It is said in Story on the Constitution (Fourth Edition), Section 1950, in speaking of the terms life, liberty and property, as follows:

> "The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right."
>
> * * * * * * *
>
> "The word, on the other hand, embraces all our liberties—personal, civil and political. None of them are to be taken away, except in accordance with established principles; none can be forfeited, except upon the finding of legal cause, after due inquiry."

In the case of *Butchers' Union Company* v. *Crescent City Company*, 111 U. S., 746, 759, this court said, in speaking of the Fourteenth Amendment:

> "The principal, if not the sole, purpose of its prohibitions is to prevent any arbitrary invasion by state authority of the rights of person and property, and to secure to everyone the right to pursue his happiness unrestrained, except by just, equal and impartial laws."

The scope of the amendment is clearly shown by the decisions of the court in the cases of *Dent* v. *West Virginia*, 129 U. S., 124, and *Allgeyer* v. *Louisiana*, 165 U. S., 578.

We feel safe in saying that this provision in the Federal Constitution prohibits any arbitrary and unjust action by a state, which will result in depriving one of its citizens of his rights without due process

of law or which will operate unequally and oppressively as to him. Many things that are within the power of a state to do, yet cannot be done arbitrarily and without regard to the liberties of the citizen.

V.

Relator was denied the right to share in the Police Pension Fund illegally and without due process of law.

We have heretofore referred to the provision of the police pension fund statute in our brief in opposition to the motion of defendants in error to dismiss the writ of error in this case, and have extracted the pertinent provisions thereof in said brief. The court will pardon the repetition for the sake of clearness and convenience. This statute is found in Hurd's Revised Statutes of Illinois (1912), beginning at page 369, and is in part as follows:

> "Section 1. That in each city, village incorporated towns in this state, having a population of 50,000 inhabitants or more, there shall be set apart the following moneys to constitute a police pension fund:
>
> * * * * * *
>
> *Third.* All moneys paid for special details of *police officers.*
>
> *Fourth.* One per cent per month, which shall *be paid* or deducted from the pension of each and every police pensioner of such city, village or town.
>
> * * * * * *
>
> *Eleventh.* One per cent per month, which shall *be paid or deducted from the salary of each and every member of the police department of such city, village or town; provided, no such*

member shall be compelled to pay more than $1.00 per month from his salary.

* * * * * *

"Section 3. Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided, however, the maximum of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have remarried. *And provided further that all police officers retired after twenty years' service in the police department of such city, village or town, * * * and who are above the age of fifty years now on the police pension rolls shall receive the same pension now*

allowed them. Provided, that in no case shall said pension exceed the sum of $900. (As amended by act approved and in force May 16, 1903.)

"Section 4. *Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement;* Provided, that the maximum sum of such pension shall not exceed the sum of $900 per year; and the minimum not less than $600; *Provided, further, that whenever such disability shall cease, such pension shall cease.* (As amended by act approved and in force May 16, 1903.)

"Section 5. *No person shall be retired as provided in the next preceding section, or receive any benefits from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and the payment aforesaid.*"

Relator paid, each month, out of his salary one per centum thereof to the fund and the city officers having supervision of it. There can be no question that his right to share in the fund, according to the provisions of the statute, is a valuable right and cannot

be arbitrarily taken from him. The statute has not been repealed by the Legislature and is still in full force and effect. Its purpose is evident and needs no explanation. The sole defence made to excuse the ruthless method by which relator was denied a share in this fund is that a pension is a mere gratuity. The Supreme Court of Illinois said nothing as to relator's contention, but seemed satisfied to hold that there were no policemen in the City of Chicago, and of this the court took judicial notice. Yet it stands undenied upon this record that relator paid his money each month for many years and as the time approached to receive the benefits of his contribution, to be retired because of the coming years, he was told that the money which he had earned and paid into the fund, as required by the law, was not for him but for the other members of the police force. It certainly cannot be supposed that the city confiscated or will confiscate the entire fund.

The Police Pension Fund Act, in express terms mentions "police officers" and "policemen," and its provisions are in favor of such officers. The petition sets up that the plaintiff in error is such a police officer and policeman, as is mentioned by the statute, the allegation is well pleaded, and, therefore, admitted by the demurrer interposed on behalf of defendants in error.

We have been successful in discovering that the exact question now before the court was decided by this court in the case of *Pennie* v. *Reis*, 132 U. S., 464, wherein was presented a consideration of the California Police Pension Act. The California statute in that case differs from the statute pleaded in

this case inasmuch as the salary of the policeman in the California Act was fixed by the State as well as the amount to be retained each month for the pension fund, whereas under the Illinois statute, *the policeman is required to pay out of his salary*, one per cent. per month and in no case over three dollars per month, and nothing is said as to the amount of his salary. **In Illinois the salary is fixed by the city.**

Furthermore, there has been no repeal in any way of the provisions of the Illinois Pension Act and the question as to the effect of a repealing statute upon rights not vested is not in this case. At the outset of the opinion, delivered by Mr. Justice Field, (p. 469) it is said:

> "It was contended in the court below that this later Act of March 4, 1889, violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law."

And in speaking of the rights of the petitioner under the California statute it is said (p. 471):

> "**Being a fund raised in that way, it was entirely at the disposal of the Government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative.** It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer

or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, was to be paid there was no vested right in the officer to such payment. His interest in the fund was, until then a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that Act. Such being the nature of the intestate's interest in the fund provided by the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express an opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes de-

MOTION TO ADVANCE.

NOTICE, MOTION, STATEMENT and REASONS FOR APPLICATION

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1910.

No. [redacted] 195.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.

In Error to the Supreme Court of the State of Illinois.

Filed September [redacted], 1910.

A. B. CHILCOAT,
Attorney for Plaintiff in Error.

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October Term, A. D. 1910.

No. 840.

Charles T. Preston,
Plaintiff in Error,
vs.
he City of Chicago *et al.*,
Defendants in Error.
} *Writ of Error.*

NOTICE.

o William H. Sexton, Corporation Counsel of said City and Counsel for Defendants in Error:

Please take notice that on Monday, May 29, 1911, the opening of said court, or as soon thereafter as unsel can be heard, the motion, a copy of which is ereto attached, will be submitted to said court for s decision thereon. Annexed hereto is a copy of e "statement of the matter involved" and the reasons for said application," which will be sub-itted with said motion in support thereof.

Charles T. Preston
A. B. Chilcoat

Counsel for Plaintiff in Error.

Received a copy of above Notice this 8th
y of May, 1911.

Wm H Sexton

Corporation Counsel, City of Chicago.

SUPREME COURT OF THE UNITED STATES.

October Term, 1910.

No. 840.

Charles T. Preston,
Plaintiff in Error,
vs.
City of Chicago *et al.*,
Defendants in Error.

MOTION TO ADVANCE.

Now comes the plaintiff in error, in the above entitled cause, by his attorney, and moves the court to advance said cause to an early hearing, for the purpose of having the same reviewed by this court, under Rule 32, applicable to "Writs of Error and Appeals, under the Act of February 25, 1889, Chapter 236." Charles T. Preston

A. B. Philpott
Counsel for Plaintiff in Error

Statement of the Case.

A petition for a writ of *mandamus* was filed in the Superior Court of Cook County, Illinois, March 11, 1903, by said plaintiff in error against the defendants in error, for the purpose of having petitioner's name restored to the pay-roll of police patrolmen in the City of Chicago, from which it was illegally, and without *due process of law*, dropped by order of the superintendent of police of said city, March 14, 1898.

By the amended and supplemental petition it is averred, in substance, that on, to-wit, the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an Act to reduce the Charter of the City of Chicago, and the several acts amendatory thereof into one act, and revise the same. That by different sections of Chapter X, of said act, provisions were made as follows:

By Section 1 of said act there was established an executive department of the municipal government of said city to be known as the board of police. Said board to consist of three commissioners, in addition to the mayor, as an *ex officio* member thereof. By Section 4 it was provided that said board should assume and exercise the entire control of the police force of said city, and possess full power and authority over the police organization, government, appointments and discipline, within said city. By Section 6 it was provided that the duties of the police

force should be executed under the direction and control of said board. That the police force should consist of a superintendent of police, three captains of police, six sergeants, ninety police patrolmen, and as many more police patrolmen as should be authorized by the common council on application of said board. That the several offices thereby created should be severally filled by appointment in the mode prescribed by the act. That each person so appointed should hold office during such time as he should observe and execute all the rules and regulations of said board, the laws of the state and the ordinances of the city. By Section 7 it was provided that "*no person shall be removed therefrom except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense.*"

That on the 16th day of February, 1865, said act was again amended by the People of the State of Illinois, represented in the General Assembly, by which amendment Sections 6 and 7 of said Act of 1863 were superseded by Sections 15, 16 and 19 of said Act of 1865. That by said Section 15 it was provided that the duties of the police force should be executed under the control of said board. *That the said force should consist of a general superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many more police patrolmen, not exceeding two hundred, as may be authorized by the common council, on the application of the board of police commissioners; each patrolman so appointed should hold office during such time as he observe and execute all the rules and regulations*

of said board, the laws of the state and the ordinances of the city.

By said Section 16 it was provided, "*that no person shall be removed therefrom, except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense.*" By said Section 19 it was provided that "the *mayor of said city should cease* to be in any manner a member of said board of police."

Said petition avers that said police force continued under the control of said board of police until the Legislature of the State of Illinois passed an act entitled "An Act to Provide for the Incorporation of Cities and Villages," approved April 10, 1872, and until the same was adopted by the legal voters of the City of Chicago, on April 23, 1875. That by Section 6 of said last mentioned act, it was provided that "all courts in this state shall take judicial notice of all villages and cities organized under this act, and of the changes of the organization under this act, and from the time of such organization or change of organization the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. *But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such village, the same as if such change had not taken place.*" That by Section 1 of Article V of said act it was provided that "the city council in cities and the president and board of trustees in villages shall have the following powers:

"*Sixty-six. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.* * * *

"Sixty-eight. To prescribe the duties and powers of a superintendent of police, policemen and watchmen."

That after the adoption of said General Act, by the legal voters of said city, and on, to-wit, the 28th of June, 1875, the city council of said city passed an ordinance, thereafter approved by the mayor, for the reorganization of the police department of said city. That Section 1 of said ordinance purported to establish and create a department of the municipal government of said city, to be known as the department of police. That Section 2 assumed to create the office of city marshal of said city, said city marshal to be appointed by the mayor, by and with the advice and consent of the city council, and to be the head of said police department. *That as such head he should assume and exercise the entire control of the police force of said city, as to the police organization, government, appointments and discipline* within said city. That by Section 5 "*the said force should consist of one general superintendent of police, one deputy superintendent of police, four captains of police, twenty sergeants, and the police now in the employ of the city, which may be increased or diminished in number from time to time.*" That by Section 17 it was provided that the police force, as heretofore existing, shall continue to be the police force until otherwise changed by this ordinance.

That afterwards, on, to-wit, the 13th day of April, 1881, the city council of the City of Chicago, passed

an ordinance, which was approved on the 18th day of April, 1881. That by said last mentioned ordinance a department of police was established in said city; that the office of superintendent of police of said city was created; and it provided that said superintendent should have the management and control of all matters pertaining to said department; that he should appoint all officers and members of said department; that said superintendent should have the power to remove from the police force of said city any police patrolman at his pleasure.

The petition insists that the provision of said ordinance purporting to give the superintendent of police power to remove from the police force of said city any police patrolman at his pleasure was directly at variance with the statute of the State of Illinois pertaining to the removal of police patrolmen from said police force in said city and therefore such provision was and is absolutely void. That the provisions of said ordinance, so far as valid, were continued in force in said city until the passage, by the Legislature of the State of Illinois, of a Civil Service Act for said city, and the adoption thereof by said city, as is hereinafter stated.

Said petition avers that petitioner was duly appointed to the office of police patrolman in said city, June 1, 1886, took the oath of office, entered upon the performance of duties as such officer, and thereafter continued in the discharge of said duties until, to-wit, March 14, 1898, when the further performance of his said duties was wrongfully and unlawfully interrupted, as hereinafter shown.

The petition avers that the *office* of police patrol-

man in said City of Chicago was created by said act of the Legislature of the State of Illinois, passed February 13, 1863, and continued by said amendment thereto, passed February 16, 1865. That under said acts a police patrolman in said city could only be removed from office after written charges preferred against them and notice thereof, and after being afforded an opportunity of being heard in his defense. That "An Act to Regulate the Civil Service of Cities" was duly passed by the Legislature of the State of Illinois, approved and in force March 20, 1895, and was duly adopted by the legal voters of the City of Chicago April 2, 1895. That afterwards, on July 1, 1895, George B. Swift, then mayor of said city, proclaimed the said Civil Service Act to be in full force and effect in the City of Chicago, and appointed three Civil Service Commissioners, who proceeded to classify the offices and places of employment in said city, pursuant to said act, making two classes thereof, the first being Class A, constituting the official service, and Class B the labor service. Division D of the official service represented the police service and included "all persons in the uniformed police force." That at the time of the adoption of said classification, all policemen in the City of Chicago, including petitioner, plaintiff in error herein, were in the uniformed police force of said city, and that by virtue of said classification they became and were classified in said Division D of the said official service of said city, under said Civil Service Act. That thereupon the offices and places of employment so classified by said commission did constitute the classified service of said City of Chi-

cago. That all police patrolmen of said city, at the time of said classification of the offices then and there held by them, respectively, then and there became police patrolmen *de jure*, in the said classified service of said city. That by Sections 31 and 32 of said Civil Service Act it is provided that "no auditing officer of said city adopting said act shall approve the payment of any salary or wages for services as an officer or employe of said city unless such person is occupying an office or place of employment according to the provisions of law, and entitled to payment therefor."

That the said board of Civil Service commissioners of said city, in compliance with said Sections 31 and 32, passed upon and certified the pay-rolls of employes and officers, including police patrolmen of said city; that by said certification it was, in legal effect, declared by said Civil Service commissioners, that all police patrolmen named on said pay-roll so certified were "entitled to be paid as persons occupying an office or place of employment" under and according to the provisions of said Civil Service Act, as being in the classified service of said city, under said act. That at the time of said classification, petitioner, plaintiff in error herein, was a police patrolman in the "uniformed police force of said city, and was thereby continued a police patrolman, as an officer *de jure*, in the police department of said city, and has so continued to be such officer from thence hitherto."

That for more than two years next prior to the 14th day of March, 1898, petitioner was a police patrolman of said city, and continuously performed the

duties of such policeman, and from month to month was certified by said Civil Service commissioners as a police patrolman of said city, entitled to pay as such under said Civil Service Act. That Joseph Kipley, superintendent of police of said City of Chicago, on, to-wit, the 14th day of March, 1898, illegally and without warrant of law, directed the name of petitioner, plaintiff in error herein, to be dropped from the pay-roll of police patrolmen of said city, and thereupon his name was dropped from said pay-roll. *That such action was taken without any charges having been preferred against him, and without any trial of any charges of any nature against him and without the written concurrence of the then mayor of said city; that said conduct of said Joseph Kipley, in so omitting and excluding his name from said pay-roll, was and is a wrongful denying to him of his legal rights, as a police patrolman of said city, to the emoluments of his said office, and was without due process of law. That in consequence of said action by said Joseph Kipley, he has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1898, until the present time. That he made demand upon the said city, Carter H. Harrison, mayor of said city, and upon said Joseph Kipley, during their incumbency of their respective offices, that his name be restored to the pay-roll of police patrolmen of said city, to which said demand they respectively refused to comply. That under the provisions of the laws of the state and ordinances of the City of Chicago, the salary to which he was lawfully entitled from said 14th day of March, 1898, until the*

present time, was $83.33 per month, less one per cent thereof, which under the provisions of the Police Pension Act, as a part of the statute law of the State of Illinois, during the period aforesaid, should be deducted by the Police Pension Board, or other proper authority of said City of Chicago, from his said salary, and paid into the Police Pension Fund of said city; that from the time of his appointment as such police patrolman of said city, on the 1st day of June, 1886, up to and including the 14th day of March, 1898, there was, from time to time, deducted from his salary, and paid into said Police Pension Fund, under the then existing Police Pension Laws of the State of Illinois, the sum of one per cent, from each and every monthly payment of his salary accruing to him. That "under the provisions of said Pension Law, to which for greater certainty and a fuller statement of the legal rights thereby secured to him to share in said fund to which he had theretofore been required to, and theretofore did, contribute as aforesaid, petitioner prays to refer with the same effect as if said act, being then and still one of the public laws of the State of Illinois, were herein fully set forth and quoted."

That the act of the said Joseph Kipley, in causing the name of petitioner, plaintiff in error herein, to be omitted and excluded from the pay-roll of police patrolmen in the department of police in said City of Chicago, resulted in the denying to him his legal right to share in the benefits of said Pension Fund, and was and is wholly unauthorized and without due process of law; and he further shows that such action of said Joseph Kipley was and is contrary to Section

2 of Article 2 of the Constitution of the State of Illinois, which reads as follows, to-wit: "No person shall be deprived of life, liberty or property, without due process of law." That such action *was and is, also, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States of America, which reads as follows, to-wit: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."*

That the action of said Joseph Kipley, and of the said other defendants, in continuing to omit and exclude petitioner's name from the pay-roll of the police patrolmen of said city had and has the effect to deprive him of his right to exercise the functions and duties of a police patrolman as a member of the Classified Civil Service of said City of Chicago, and to receive and enjoy the salary pertaining to the office of police patrolman of said city so held by him, which was and is a wrongful denying to him of his legal rights and without due process of law, and of the equal protection of the law. That the City of Chicago, the mayor of said city and the superintendent of police of said city are respectively estopped by law and by the facts hereinbefore stated and set forth, *to now deny that he was, on the said 14th day*

of March, 1898, and from thence hitherto has been, and still is, a police patrolman in the Classified Civil Service of said city, under said Civil Service Act, and that he was, and is as such police patrolman, entitled to all the benefits *and protection afforded by said Civil Service Act, and particularly to the benefits and protection of the provisions of said act governing the removal or discharge from said service of police patrolmen of said city, in the classified service thereof.* That before the filing of said petition herein, the said Joseph Kipley was succeeded in the said office of superintendent of police of said City of Chicago, by Francis O'Neill, duly appointed by Carter H. Harrison, the then mayor of said city. That said Francis O'Neill was succeeded by John M. Collins, who was appointed to the office of superintendent of police of said city by Edward F. Dunne, who was succeeded in office as mayor of said city by Fred A. Busse. That said John M. Collins, said superintendent of police of said city, was succeeded in said office by George M. Shippy, appointed to said office by said Fred A. Busse, the then mayor of said city. That since the filing of the said petition herein, the personnel of said Civil Service Commissioners of said City of Chicago has been changed and said Civil Service Commissioners now consist of Elton Lower, M. L. McKinley and H. D. Fargo. That appropriations were made by the city council of said city for the year 1886, and for each and every year thereafter, up to and including the year 1898, for the payment of police officers and employes of said city. That during all of said time, from the said 1st day of June, 1886, up to and including said 14th day of

March, 1898, petitioner was a police patrolman in the said uniformed police force of said city, and drew his salary as a police patrolman of said city. That from the 1st day of July, 1895, up to the said 14th day of March, 1898, petitioner drew his pay, as such uniformed police patrolman, from month to month, his monthly voucher for each and every month thereof being duly certified by said Civil Service Commissioners of said city, as his pay therefor became due him. That in like manner, in the year 1899, and each and every year thereafter, up to and including the present time, there were annual appropriations made by said city council of said city, for the payment of police patrolmen in the uniformed police force of said city, in the *Classified Civil Service thereof*, for each and every ensuing year, respectively; that he is entitled under said appropriations to be carried upon said pay-roll for each and every month of said several years, up to and including the present time, as having been lawfully in the service of said city, in the classified service thereof, as a police patrolman in said city.

The petitioner avers that from the time said Joseph Kipley, claiming to act in that behalf as superintendent of police of said city, caused the name of petitioner to be omitted and excluded from the pay-roll of the police department of the said city; and each and every one who has been duly and legally appointed to the office of superintendent of police of said city, from the month of January, 1900, up to and including the present time, has still caused, and so causes, the name of your petitioner to be excluded and omitted from said pay-roll.

That in consequence of the wrongful action of the said Joseph Kipley, and those who have followed him in office as superintendent of police of said city, up to and including the present time, in causing the omission of your petitioner's name from the pay-rolls of police patrolmen of said city, your petitioner has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1908, until the present time. And your petitioner has made demand upon the said City of Chicago, and upon said Carter H. Harrison, mayor of said City of Chicago, and upon Joseph Kipley, as superintendent of police of said City of Chicago, which demand was made during their said incumbency of their respective offices, that his name should be placed on, or restored to, the pay-roll of police patrolman of said City of Chicago, to the end that your petitioner might be enabled to draw the salary due him as a police patrolman, alike the salary already accrued to him, and the salary accruing to him from month to month as such police patrolman of said City of Chicago, to which he is justly and lawfully entitled; but the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph Kipley, as superintendent of police thereof, and those who have followed him in said office as superintendent of police of the said City of Chicago, whom your petitioner makes defendants herein, have respectively refused to comply with your petitioner's reasonable and lawful demand in the premises, and still do refuse so to do.

The petitioner prays a writ of mandamus under

the seal of the court directed to the City of Chicago and certain officers of said city, commanding them respectively as follows: Commanding said City of Chicago and said respective officers, other than the Civil Service Commissioners, to forthwith place the name of your petitioner upon the roster of police patrolmen of said City of Chicago, to the end that petitioner may hereafter draw the pay due petitioner as police patrolman of said City of Chicago, from time to time as other police patrolmen are paid; and

Commanding said Civil Service Commissioners of said City of Chicago to certify the name of petitioner as a person entitled to pay as a police patrolman of said City of Chicago whenever petitioner's name shall hereafter appear as such police patrolman upon any pay-roll of police patrolmen presented to the Civil Service Commissioners for certification—to the end that petitioner may hereafter draw the salary due him as a police patrolman of said City of Chicago, as other police patrolmen are paid.

The petitioner also asks that such further order may be made in the premises as justice may require.

The respondents to said petitioner, said City of Chicago *et al.*, filed a demurrer thereto, which demurrer was sustained and said amended and supplemental petition was by order of said court dismissed.

A writ of error was sued out of the Supreme Court of Illinois, and the record of said Superior Court was brought before said Supreme Court for a review of the action of Superior Court. Said Supreme Court of Illinois sustained the action of said Superior Court in the premises; and petitioner by writ of error duly issued has brought said proceedings to this court.

for its action in the premises, to the end that petitioner may obtain his legal rights, under the Constitution of the United States, of which he is now deprived by said action of said Supreme Court of Illinois.

REASONS FOR THE APPLICATION.

1. That petitioner, plaintiff in error herein, was deprived of his right to perform the functions or duties of his office as a police patrolman in the department of police in the City of Chicago without due process of law, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and of Section 1 of Article XIV of the Amendments to the Constitution of the United States; which action was, in legal effect, a deprivation of petitioner's right to perform the functions or duties of his said office without having written notice of charges preferred against him, and an opportunity afforded him of being heard in his defense.

2. That said action was, in legal effect, a deprivation of petitioner's property rights to the emoluments incident to his said office, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. That there are twenty cases in the Superior Court of Cook County, Illinois, and twenty-seven cases in the Circuit Court of Cook County, Illinois, awaiting the opinion of this court in the case at bar.

That at the time the case at bar was filed in the Superior Court of Cook County, Illinois, there were twenty more cases filed, in said court, by police pa-

trolmen of said City of Chicago, and twenty-seven more cases filed, in the Circuit Court of said Cook County, by police patrolmen of said city; the same form of petition was filed in each of said cases, and for the same cause; and in each and every of said cases the same form of amended and supplemental petition was filed, by an order of court first had and obtained: and the general demurrer thereto, in each of said cases, was sustained, and the petition in each of said cases was dismissed by the court, with judgment entered therein, against petitioner for costs. That the time to prosecute a writ of error in each of said cases will expire before the case at bar will be considered by this court, except the case at bar be advanced to an early hearing; so that if this court were to find in favor of the plaintiff in error herein, the petitioner in each one of the other cases mentioned herein might have an opportunity to obtain his legal rights by reason of the favorable ruling upon the case at bar.

That a number of the other persons—who were, and for years past have been, excluded from the exercise of the powers and performance of the duties of policemen, under the same and identical conditions as those advanced by the petitioner herein, as entitling him to the relief sought herein by reason of the wrongful exclusion of such persons, respectively, from the exercise of the office and performance of the duties of police officers of said city and members of said city's police force, and in consequence of the wrongful conduct of said city in the premises, have been deprived of the pay attached to such office and services under the provisions of the ordinances

of said city from time to time adopted by the city council of said city and in force—are men of family, in moderate circumstances, and compelled to seek and enter upon other service as a means of livelihood for themselves, respectively, and their respective families; and by reason of the decision of said Supreme Court of the State of Illinois cannot recover their rights and the emoluments attaching to the exercise thereof, and the right of action claimed by said several parties is liable to become barred by the Statute of Limitations, unless this court shall, in the exercise of its high powers in the matter of compelling the due administration of justice and the law, give early hearing to this case and announce and declare truly the law and the legal rights of the petitioner herein. And plaintiff in error also asks the court to fix the time within which the parties hereto, respectively, shall file herein their Briefs and Arguments in this case. Charles T. Preston

A. B. Babcock

Attorney for Plaintiff in Error.

SUBJECT INDEX.

CASES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 474.

CHARLES T. PRESTON,

Plaintiff in Error,

vs.

THE CITY OF CHICAGO ET AL.,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED DECEMBER 30, 1910.

To John W. Beckwith,

Attorney for Defendants in Error:

Please take notice, that on Monday, June 3, 1912, at the opening of said court, or as soon thereafter as counsel can be heard, we shall present to said court, brief of argument of plaintiff in error in opposition to motion of defendants in error to dismiss writ of error or affirm judgment of the Supreme Court of Illinois, copy of which is hereto attached.

E. B. Chilcott

Stephen A. Day

Attorneys for Plaintiff in Error.

Received copy of the above notice this 31st day of May, A. D. 1912.

John W. Beckwith

Attorney for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

No. 474.

CHARLES T. PRESTON,

Plaintiff in Error,

vs.

THE CITY OF CHICAGO *et al.*,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF ILLINOIS.

Filed, December 30, A. D. 1910.

BRIEF OF ARGUMENT, PLAINTIFF IN ERROR, IN OPPOSITION TO MOTION OF DEFENDANTS IN ERROR, TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF SUPREME COURT OF ILLINOIS.

Now comes the plaintiff in error, in the above entitled cause, by counsel, and present to the Court abstract of record, statement and brief of argument in opposition to the motion of defendants in error, to dismiss the writ of error or affirm the judgment of the Supreme Court of Illinois.

Defendants in error, set up in their motion to dismiss said writ.

> "*First.* That there is no such federal issue involved in said cause as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error, seeking to raise a federal issue in this cause, are so frivolous as not to need further argument."

In our reply in opposition thereto, we affirm and firmly believe.

First. That there are such federal questions involved in said cause as to give this Court jurisdiction; and

Second. That the contentions of plaintiff in error, in seeking to raise the said Federal questions, are meritorious; and that they, as we firmly believe, can be fully established, if counsel for plaintiff in error be permitted to fully present argument in favor thereof, to this Court.

In making our statement of the said cause of action, we desire to present to this Court all the salient and material facts in issue, as set forth in the pleadings, as briefly and concisely as we may, all of which are admitted by the general demurrer, filed thereto by the defendants in the trial court, defendants in error herein.

ABSTRACT OF RECORD.

This is a writ of error to the Supreme Court of inois, to review the judgment of that court, af- ning the judgment of the Superior Court of Cook unty, in said state, denying writ of mandamus the petitioner in said cause. The judgment was dered in the Superior Court of said Cook County, er a general demurrer to the original petition, l amended and supplemental petition filed there- had been sustained by said Superior Court.

The pleadings set up in the record, in said cause, ore this Court for review, show that, on the 11th of March, 1903, the petitioner, plaintiff in error ein, filed his petition in the Superior Court of Cook County, praying a writ of mandamus, to ore his name upon the roster of police patrol- in the department of police in the City of Chi- o, and upon the payroll thereof, and to certify name for the payment of his salary, from month nonth, as such police patrolman. That a general urrer was filed to the original petition filed ein, and thereafter, by leave of Court, first had, mended and supplemental petition was filed, said general demurrer filed as aforesaid, was ved, by the court, to stand to the said amended supplemental petition, and thereafter was sus- d by the said Superior Court, and the petitioner ng elected to stand by his said petitions, they dismissed, and a judgment for costs, was en- against him. That petitioner sued out this

writ of error to said Court to review said judgment, on the ground that *he was illegally and without warrant of law, wrongfully removed from the payroll of police patrolman*, in such department of police, and was then and there *illegally and without due process of law, deprived of his right to perform the duties or functions of his office, and to share in the Police Pension Fund, created under and by virtue of the Police Pension Fund Law.*

The salient and material facts set up in the original and amended and supplemental petitions, beginning at page 2 of the transcript of record herein, are as follows:

That the "City of Chicago" is, and has been for more than twenty years last past, a municipal corporation in said Cook County, and State of Illinois, incorporated and organized under an act of the Legislature of said State, entitled "an Act to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872, and existing subject to said act and the several acts amendatory thereof.

That Carter H. Harrison is now and ever since the month of April, 1897, has been the mayor of said City of Chicago, duly elected and acting as such mayor.

That from the 18th day of April, 1881, there has been and still is an "Executive Department of the Municipal Government of said City of Chicago," known as the department of police, which department was created by an ordinance of said City of Chicago; that by said ordinance said executive de-

partment was made to embrace "the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been, or may be, prescribed by ordinance."

That by the ordinance, creating said "Executive Department," there was created the office of "Superintendent of Police," which superintendent, by provisions of said ordinance, was to be appointed by the mayor of said city, by and with the advice and consent of the city council of said city, on the first Monday in May, 1881, "or as soon thereafter as may be," and biennially thereafter.

That on the 1st day of June, 1886, your petitioner was a citizen of the United States, 39 years of age, and for more than two years next previous to said 1st of June, 1886, had been a resident of the City of Chicago, in said Cook County, Illinois, and was a qualified elector of said city, and had never been a defaulter to said municipal corporation. That on said 1st day of June, 1886, petitioner was duly appointed to the office of police patrolman in said department of police in said City of Chicago, took the oath of office prescribed for such police patrolman, and entered upon his duties as such police officer of said City of Chicago.

That on the 14th day of March, 1898, the superintendent of police of said City of Chicago, directed the name of petitioner to be dropped from the payroll of the policemen of said city, and the name of

petitioner was dropped from said payroll; that from thence hitherto the superintendents of police of the City have caused the name of petitioner to be omitted and excluded from the payroll of the police department of said city, and still so causes the name of petitioner to be omitted from said payroll. That the said conduct of the said superintendents, in so causing the name of petitioner to be omitted and excluded from the said payroll, was and is wholly unauthorized, invalid and contrary to and in disregard of the *legal rights* of petitioner.

That in consequence of the wrongful action of the said superintendents, in causing the omission of petitioner's name from the police payrolls of said city, petitioner has not been paid any portion of the salary accruing and due to him as a police officer as aforesaid, from said 14th day of March, A. D. 1898, until the present time.

That petitioner has made demand upon the said city, and upon the said Carter H. Harrison, mayor thereof, and upon the said Joseph Kipley, as superintendent of police of said city, while he was such superintendent, that petitioner's name should be restored to the police payrolls of said city, to the end that petitioner might draw the salary due him as such police officer, also the salary already accrued and due him, and the salary accruing to him as such police officer of said city, to which he was and is justly and lawfully entitled; but that the said city, the said Carter H. Harrison, as mayor thereof, and the said Joseph H. Kipley as superintendent of police thereof, respectively, refused to comply with

petitioner's reasonable and lawful demand in the premises and still refuse so to do. And in this behalf petitioner shows that under the provisions of the laws and ordinances of the said city the salary to which petitioner was and is lawfully entitled, from said 14th day of March, 1898, until the present time, was the sum of $83.33 per month.

That from the time of petitioner's appointment as a police officer of said city, until the said 14th day of March, A. D. 1898, *there had been and was deducted from his salary and paid into said Police Pension Fund by petitioner, under the provisions of existing laws, the sum of one per cent., from each and every monthly payment of salary accruing to your petitioner; and that under the provisions of said law petitioner was and is entitled to share in the benefits and advantages of said Police Pension Fund.*

That by Section 3 of the Civil Service Act of the State of Illinois (Rev. Stat. Ill. 1909, p. 442), it was expressly provided, and required as follows:

> "Said commissioners shall classify all the offices and place of employment in said city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11, of this act. *The officers and places so classified by the commission shall constitute the classified civil service of said city.*"

That soon after the organization of said commission, in accordance with the terms of said act, the said commissioners classified the various offices and places of employment of said city.

That the first board of civil service commissioners, at the request of the chief executive officers of the said city, and the comptroller of said city, adopted the practice of passing upon and certifying all payrolls of the employes of said city, including the payrolls of all police patrolmen in the employ of said city, which practice has continued from thence hitherto; and it was then, and ever since has been, required by the comptroller of said city, and by said board of civil service commissioners, that all payrolls in said city, including the police payroll, should be so certified as a condition of payment thereof.

That by said certification it was declared by said board of civil service commissioners, that all persons whose names were upon said payrolls so certified, were entitled to be paid, as persons holding office under said Civil Service Act; that by the payment of said payrolls so certified, by the comptroller and other officers of said city, such officers and said city, admitted that all persons whose names were upon such payrolls, were occupying offices or places of employment under and according to the provisions of said Civil Service Act, and entitled to payment thereunder as being in the classified civil service of said city, under said act.

That for more than two years next prior to March 14, 1898, *petitioner was duly carried upon the police payrolls of said city, and from month to month was duly certified by said civil service commission, as a police patrolman entitled to pay as such, under said Civil Service Act.*

In the amended and supplemental petition it is alleged that on the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revised the same. That by different sections of Chapter X of said act, provisions were made establishing a department of police consisting in part of police patrolmen and providing that they be not removed without notice and hearing and for good cause only.

Said police force so continued under the control of the police board aforesaid, created by acts of 1863 and 1865, until the adoption by the Legislature of the State of Illinois, of the General Act to provide for the incorporation of cities and villages, approved April 10, 1872, and adopted by the City of Chicago, April 23, 1875.

That by said act it was amongst other things provided as follows:

> "Section 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the changes of the organization under this act; and from the time of such organization or change of organization the provisions of this act shall be applicable to such cities and villages, and all laws in conflict therewith shall no longer be applicable. But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place."

That by Section 1 of Article V of said act it was provided as follows:

> "The city council in cities and the president and board of trustees in villages shall have the following powers: * * *
>
> Sixty-six. To REGULATE the police of the city or village, and pass and enforce all necessary police ordinances. * * *
>
> Sixty-eight. To prescribe the duties and powers of a superintendent of police, policeman and watchman."

That on the 28th day of June, 1875, the city council of the City of Chicago duly passed an ordinance approved by the mayor, for the reorganization of the police department of said city, continuing said force as theretofore existing.

That on the 13th day of April, 1881, the city council of the City of Chicago duly passed an ordinance of said city creating the office of superintendent of police and giving him power to appoint all officers of the police force, with the concurrence of the mayor.

That the aforesaid provisions of said ordinance, continued in force until adoption by said city, of an Act of the Legislature of the State of Illinois, entitled "An Act to Regulate the Civil Service of Cities," the 25th day of March, 1895, and until the first day of July, 1895, when the then mayor of said City of Chicago, by his proclamation, declared the said act to be thereafter in full force and effect in said City of Chicago.

By said act, classification was made in part as follows:

> "2. Classified Service.—All other offices and

places of employment in said city under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service. With reference to the examinations hereinafter provided for, they are hereby classified under two general classes, to be known as Class A and Class B, respectively. This classification is based mainly upon nature of employment. *The positions embraced in Class A will be chiefly those of a permanent character, while those in Class B will be more in the nature of temporary employment.*

3. Class A shall be known as the official service, and Class B shall be known as the labor service.

4. For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon amount of compensation. The several divisions of the official service shall be as follows. * * *

Division D.—Police Service.—All persons in the uniformed police force."

That all policemen in said city, including your petitioner, were, at the time of said classification, in the uniformed police force of said city, and by virtue of said act and rule of said commission and the classification thereunder, became and were classified in Division D of said official service of said City of Chicago, under said Civil Service Act, and thereupon the offices and places of employment so classified, by said commission, did "constitute the classified service of said city;" that by said provision, the classification of the offices of police patrolmen of said city, then and there held by them, the then

incumbents of said offices, including petitioner, then and there became police patrolman, de jure, in the classified service of said city, so continued from thence hitherto.

That the superintendent of police of said city, illegally and without warrant of law, directed the name of petitioner to be dropped from the payroll of police patrolman of said city, and that by and under such direction the name of petitioner was dropped from said payroll; *that such action was taken without any charges having ever been preferred against him, and without any trial of any charges of any nature preferred against him; nor was such action because of any alleged misconduct on his part; and said action was taken without the written concurrence of the then mayor of said city;* that from thence the said superintendent of police of said city, during his term of office, caused the name of petitioner to be omitted from the payroll of the police department of the said city; and every person duly appointed to the office of superintendent of police of said city, from the month of January, 1900, up to and including the present time, has still caused, and so causes, the name of petitioner to be omitted from said payroll; that said conduct of said superintendents of police in omitting the name of petitioner from said payroll, was and is a wrongful denying to petitioner of his *legal rights, as an enrolled police patrolman of said city under said Civil Service Act, to the emoluments of his said office, and was without due process of law.*

That the acts of the said superintendents of police of said City of Chicago, in directing the name of petitioner to be dropped from the payroll of police patrolmen of the said City of Chicago, as aforesaid, and in causing the name of petitioner then and thereafter to be omitted from the payroll of the police department of said city, *resulted in the denying to petitioner his legal right to share in the benefits of said fund, and was and is wholly unauthorized and without due process of law.*

That such action was and is contrary to Article 2 of the Constitution of the State of Illinois and Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

That the said petitioner insists that such action in continuing to omit the name of your petitioner from the payroll of said city, and in omitting the name of petitioner from the payroll of the police department of the said city, *had and has the effect to deprive petitioner of his right to exercise the functions and duties of a police patrolman as a member of the Classified Civil Service of said City of Chicago, and to receive and enjoy the salary pertaining to the office of police patrolman of said City, so held by him;* which claim of said defendants, and their conduct in the premises, was and is a wrongful denying to petitioner of his *legal rights and without due process of law.*

That all of the foregoing facts were admitted to be truly stated by the general demurrer filed thereto by the defendants in said cause.

For the convenience of the Court we quote from the Statutes of the State of Illinois, the so-called Police Pension Fund Law. (Revised Statute of Illinois (Hurd), 1905, pp. 378, 379 and 380.)

We will specially call attention to Section 1, 3, 4 and 5 of said act.

"Section 1. That in each city, village incorporated towns in this state, having a population of 50,000 inhabitants or more, there shall be set apart the following moneys to constitute a police pension fund:

* * * * *

Third. All moneys paid for special details of *police officers.*

Fourth. One per cent per month, which shall *be paid* or deducted from the pension of each and every police pensioner of such city, village or town.

* * * * *

Eleventh. One per cent per month, which shall *be paid or deducted from the salary of each and every member of the police department of such city, village or town: provided, no such member shall be compelled to pay more than* $1.00 *per month from his salary.*

* * * * *

Section 3. Whenever any person at the time of the taking effect of said act, to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force of such city, village or town of this state, subject to the provisions of this act, or where the combined years of service of any person upon the police force and the fire department, as aforesaid, of such city, village or town of this state, shall aggregate twenty years or more, said board shall order and direct that such person, after becoming fifty years of age and his services on such police force shall

have ceased, and all officers entitled to and having a pension under said act, to which this is an amendment, after the taking effect of this act, shall be paid from such fund, a yearly pension equal to one-half the amount of salary attached to the rank which he may have held on said police force for one year immediately prior to the time of such retirement; provided, however, the maximum of said pension shall not exceed the sum of $900 and the minimum not less than $600. And after the decease of such member his widow or minor child or children under sixteen years of age, if any survive him, shall be entitled to the pension, provided for in this act, of such a deceased husband or father; but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of said police department after she shall have remarried. *And provided further that all police officers retired after twenty years' service in the police department of such city, village or town, * * * and who are above the age of fifty years now on the police pension rolls shall receive the same pension now allowed them.* Provided, that in no case shall said pension exceed the sum of $900. (As amended by act approved and in force May 16, 1903.)

Section 4. *Whenever any person, while serving as a policeman, in any such city, village or town, shall become physically disabled while in and in consequence of the performance of his duties as such policeman, said board shall upon his written request, or without such request, if it deem it for the good of said police force, retire such person from active service, and order and direct that he be paid from said fund a yearly pension not exceeding one-half the amount of the salary attached to the rank which he may have held on said police force at the time of his retirement;* Provided, that the maximum sum of such pension shall not exceed the sum of $900

per year; and the minimum not less than $600: *Provided, further, that whenever such disability shall cease such pension shall cease.* (As amended by act approved and in force May 16, 1903.)

Section 5. *No person shall be retired as provided in the next preceding section, or receive any benefits from said fund unless there shall be filed with said board certificates of his disabilities, which certificates shall be subscribed and sworn to by said person and by the police surgeon (if there be one) and two practicing physicians of such city, village or town, and such board may require other evidence of disability before ordering such retirement and the payment aforesaid.* (Revised Statutes of Illinois (Hurd) 1905, pp. 378, 379 and 380.)

STATEMENT.

The motion of defendants in error is based upon the grounds, first, that there is no Federal question in the case, and, second, that the contentions of plaintiff in error seeking to raise a Federal question in this case are so frivolous as not to need further argument.

There is no possible doubt but that there was a Federal right specially set up and denied by the State Court. In its opinion it has said:

> "Third. That the removal of petitioner without notice of written charges preferred against him and being afforded an opportunity to be heard was a denial to him of due process of law, in violation of Section 2 of Article II of the constitution of the State of Illinois and Section 1 of the Fourteenth Amendment of the Constitution of the United States. This question was passed upon and decided contrary to petitioner's contention in *People* v. *City of Chicago, supra, McNeill* v. *City of Chicago, supra, Kenneally* v. *City of Chicago, supra,* and *Donahue* v. *County of Will,* 100 Ill., 94."

It thus appears that the Constitution of the United States was invoked to protect the right of the petitioner arising therefrom. This, we submit, disposes of the contention that there is no Federal question in the case. *The writ of error was allowed by the State Court.* (Transcript, p. 29.)

The petition for a writ of mandamus relied, first, upon petitioner's rights as a police officer of the City of Chicago and a duly certified and enrolled officer in full standing under the Civil Service Act of the State of Illinois; and, second, upon his rights under

the Police Pension Fund Act of the State of Illinois under which he had paid a percentage of his salary monthly for ten years and which law had been in no way repealed but was and is in full force and effect. The opinion of the Supreme Court of Illinois disposes of both these contentions in the language just above quoted. It thus appears that one Federal question in the case was distinctly and expressly passed upon in the opinion of the State Court and the other (the pension fund question) was not given specific mention.

BRIEF OF ARGUMENT.

It is well settled under the decisions of this Court that a motion to dismiss will be denied where a claim of Federal right under the Constitution of the United States has been specially set up and denied by the decision of the State Court, whether such question appears to have been expressly passed upon or must have been denied by the State Court in reaching its conclusion.

Missouri K. & T. R. Co. v. *Elliott*, 184 U. S., 30.

Kaukauna Co. v. *Green Bay & Canal Co.*, 142 U. S., 254.

Detroit, etc., Ry. v. *Osborn*, 189 U. S., 383.

Schlemmer v. *Buffalo, Rochester, etc., Ry.*, 205 U. S., 1, 11.

Terre Haute & Indianapolis R. R. Co. v. *Indiana*, 194 U. S., 579.

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S., 683, 697.

Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574, 579.

Bohanan v. *Nebraska*, 118 U. S., 231.
West Chicago R. R. v. *Chicago*, 201 U. S., 506, 519, 520.

This doctrine is so fully recognized that we will only quote from the last case just above cited (*West Chicago Railroad* v. *Chicago, supra*):

> "The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the State Court rests partly upon the grounds of local or general law. But, by its necessary operation—although the opinion of the State Court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for, the Federal questions arose covering the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this Court had jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, Burlington & Quincy R. R. Co.* v. *Drainage Commissioners*, 200 U. S., 561."

In *Detroit, etc., Ry.* v. *Osborn, supra*, which was a petition for a writ of mandamus setting forth a claim of a denial of due process of law under the

Constitution of the United States, similar to the petition in the case at bar, it was said:

> "A motion is made to dismiss the writ of error on the ground that the record exhibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States and the decision of the Supreme Court of the State was tantamount to the denial of that right. *Kaukauna Co.* v. *Green Bay & Canal Co.*, 142 U. S., 254."

As to the second ground of the motion that the Federal question in this case is so frivolous as not to need further argument, we deem it necessary for the purposes of this motion only to refer to the fact that petitioner was duly certified and enrolled under the Civil Service Act of the State of Illinois as one of the uniformed police of the City of Chicago and as such was paid by said city. It is contended that such certification did not operate to confer upon petitioner the office of police patrolman and that it has no bearing upon the question as to whether petitioner was a *de jure* officer. But petitioner need not have been a technical officer—he could not be deprived of his rights acquired by the certification and enrollment without due process of law.

United States ex rel. Turner v. *Fisher* (Dec. 4, 1911), 222 U. S., 204.

Garfield v. *United States*, 211 U. S., 249.

To reach this conclusion the Supreme Court of Illinois saw fit to take a position contrary to that of this Court in the case of *United States* v. *Wickersham*, 201 U. S., 390, and we quote the following language from the opinion (p. 397) therein:

"On September 26, 1896, under the extension order referred to and the action of the Secretary of the Interior, the acting Secretary of the Interior filed a list of positions and employés with the Civil Service Commission, which, among others, in the list of employés in the offices of surveyors-general, contained the name of the appellee as a stenographer and typewriter, the date of his appointment, salary and residence, as stated in the findings of fact. By the action recited on the part of the President and the head of the Department of the Interior, Wickersham was brought within the protection of the law and the President's order afforded to persons duly entered in the classified Civil Service. While he may not technically have been an officer of the United States with a fixed term and compensation, he certainly was within the subordinate places provided for in the statute, and within the 'employes outside the District of Columbia,' covered by the President's order of May 6, 1896. That order expressly included officers and employes, whether compensated by a fixed salary or otherwise, serving in a clerical capacity or whose duties were in whole or in part of a clerical nature. The Secretary of the Interior certified the name of the claimant to the Civil Service Commission as an employe in the office of the surveyor-general, within the terms of the statutes and the Executive order. He was therefore, entitled to the protection of the President's order of July 27, 1897 (14 Ann. Rep. Civ. Serv. Comm. 133); 'no removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.'

"If the contention of the Government be correct and the attempted suspension by the surveyor-general was equivalent to a dismissal from

> office, such action would run counter to the requirements of the Presidential order just quoted. The action of the surveyor-general was not upon written charges, and no notice or opportunity to make defense was given to the accused, as provided in that order. The appellee being entitled to the protection of this order, and to have notice of the charges preferred, and an opportunity to make defense, the attempted removal, if such it was, was without legal effect; nor can we find any authority, statutory or otherwise, authorizing the suspension in the manner undertaken in this case."

The Federal question presented is whether the decision of the State Court permitting petitioner to be deprived of his *rights* as a policeman in good standing and with ability to perform the duties of his office, without a hearing and without charges preferred against him, is not a denial of due process of law, the equal protection of the laws and the abridgment of his privileges and immunities as a citizen of the United States. In other words, does not the Fourteenth Amendment of the Constitution of the United States guarantee to petitioner the right to have charges preferred against him and to be heard in his defense, before striking his name from the rolls—rights which were specially set up and prayed for in the petition? Is not a system of laws which will permit a policeman to be thus deprived of his rights under sanction of State authority wanting in due process of law, does it not deny to him the equal protection of the laws, and abridge his privileges and immunities as a citizen of the United States and of the State of Illinois?

As this Court said in *Garfield* v. *United States*, 211 U. S., 249:

> "It has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard. The right to be heard before property is taken or rights or privileges withdrawn, which have been previously legally awarded is of the essence of due process of law."

The action of the State Court in denying the petitioner his Federal rights are sought to be supported upon the theory that no property right is involved and the case of *Donahue* v. *Will County*, 100 Illinois, 94, is cited. In answer to this contention, it is only necessary to refer to the fact that Section 2 of Article II of the Constitution of the State of Illinois was before the Court in that case, and no question or construction of the Fourteenth Amendment of the Constitution of the United States. Whatever may have been said by the Supreme Court of Illinois in regard to what constitutes property within the meaning of the Illinois Constitution is not decisive of that question in this Court, for reasons which are obvious and entirely well understood.

In a consideration of civil rights under the Fourteenth Amendment no definite rule has ever been announced, but Mr. Justice Miller's process of "inclusion and exclusion" has been applied. Whether under the petition now before the Court there has been any deprivation of Federal rights cannot be determined without a full consideration of all the facts and surrounding circumstances. It is therefore idle to attempt to urge this Court to deny a full hear-

ing to plaintiff in error merely because of what the State Court decided was the proper interpretation of its own Constitution.

As to the second Federal question presented, that covering the claim under the Police Pension Fund Act, we desire to emphasize the fact that the statute in express terms mentions "police officers" and that its provisions are in favor of such officers. The petition sets up that the plaintiff in error is such a police officer as is mentioned by the statute, the allegation is well pleaded, and, therefore, admitted by the demurrer interposed on behalf of defendants in error.

We have been successful in discovering that the exact question now before the Court was decided by this Court in the case of *Pennie* v. *Reis*, 132 U. S., 464, wherein was presented a consideration of the California Police Pension Act. The California statute in that case differs from the statute pleaded in this case inasmuch as the salary of the policeman in the California Act was fixed by the State as well as the amount to be retained each month for the pension fund, whereas under the Illinois statute, *the policeman is required to pay out of his salary*, one per cent per month and in no case over three dollars per month, and nothing is said as to the amount of his salary. **In Illinois the salary is fixed by the city.** Furthermore, there has been no repeal in any way of the provisions of the Illinois Pension Act and the question as to the effect of a repealing statute upon rights not vested is not in this case. At the outset of the opinion delivered by Mr. Justice Field (p. 469) it is said:

"It was contended in the Court below that this later Act of March 4, 1889 violated that provision of the Constitution of the United States, and of the State, which declares that no person shall be deprived of his property without due process of law."

And in speaking of the rights of the petitioner under the California statute it is said (p. 471):

"Being a fund raised in that way, it was entirely at the disposal of the Government, until, by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative. It requires no argument or citation of authorities to show, that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the State impaired no absolute right of property in the police officer. The direction of the State, that the fund should be one for the benefit of the police officer or his representative, under certain conditions, was subject to change or revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money, or a part of it, was to be paid there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority. The law of April 1, 1878, having been repealed before the death of the intestate, his expectancy became impossible of realization; the money which was to pay the amount claimed had been previously transferred and mingled with another fund, and was no longer subject to the provisions of that Act. Such being the nature of the intestate's interest in the fund pro-

vided by the law of 1878, there was no right of property in him of which he or his representative has been deprived.

If the two dollars a month, retained out of the alleged compensation of the police officer, had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that, upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express an opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed, could be transferred to other parties and applied to different purposes by the Legislature."

The opinion of the State court in the case at bar is silent as to petitioner's rights under the Police Pension Fund Act of the State of Illinois. That such court, however, recognizes that police officers exist and are entitled to the benefits of this act has been expressly decided by said court in the case of *Morgan* v. *People*, 296 Ill., 437, wherein it has said (p. 444):

"The facts relating to the claims of the appellees other than Margaret Morgan are not set out or mentioned in the abstract or briefs, and in our consideration of the case we will confine ourselves to the facts as disclosed and relating to the case of the appellee, Mrs. Mor-

gan. James Morgan, her husband, was a police officer of Chicago more than twenty years and was upwards of fifty years of age on November 30, 1891, and was retired as of that date from active duty on a pension of $50.50 a month, under the Act of 1887."

And, further, on page 145, it is said:

"We may say the act went further, and preserved the rights not only of the officers in active service, but all the officers drawing pensions under retirement by virtue of the Act of 1887."

It is said in the opinion (p. 149):

"A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a faulty law is no reason why that law may not be repealed and the pension cease."

Defendants in error cite this language as sufficient to show that there is no Federal right denied to petitioner by the decision of the State Court. But the absurdity of such a contention is at once apparent when we consider that the petitioner was not deprived of his rights under this act, whatever they were, in accordance with due process of law. Whether the proceedings taken by the defendants in error amounted to due process of law must be determined by this Court for itself, since the jurisdiction of this Court has been properly invoked by the petitioner. Upon this point we desire only to refer to a single case, *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S., 683, 696. The following is quoted from the opinion by Mr. Justice Harlan:

"The language of this statute is too plain to need interpretation. * * * As this question is at the very foundation of the inquiry whether the defendant had a faulty contract with the state, the obligation of which has been impaired by subsequent legislation, we cannot avoid its determination. Whether an alleged contract arises from state legislation, or by agreement with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment and independently of the adjudication of the State Court, to decide whether there exists a contract within the protection of the Court of the United States. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Wright* v. *Nagle*, 101 U. S., 791, 794; *Louisville & Nashville R. R.* v. *Palmes*, 109 U. S., 254, 257. After carefully considering the grounds upon which the State Court rests its conclusion, we have felt constrained to reach a different result."

Also to the following, taken from the opinion of this Court in *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 574, 579:

"The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the Court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes upon the authority of which alone the auditor of the state proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This Court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below. And our

jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

The case of *Schlemmer* v. *Buffalo, Rochester, etc., Ry.*, 205 U. S., 1, is also very instructive upon this point, and we desire to quote the following from the opinion by Mr. Justice Holmes (p. 11):

"We certainly do not mean to qualify or limit the rule that, for this Court to entertain jurisdiction of a writ of error to a State Court, it must appear affirmatively that the State Court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. *Bachtel* v. *Wilson*, Jan. 7, 1907, 204 U. S., 36. But, on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this Court will take jurisdiction, although the opinion below says nothing about it. *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S., 254. And if it is evident that the ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. *Terre Haute & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S., 579."

And to the following quoted from page 587 of the opinion by the same eminent justice in the case last cited:

"We are driven to a different construction of the charter, notwithstanding the deference

naturally felt for the decision of a State Court upon state laws. The language is plain."

And on page 589 thereof the following:

"We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the State Court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S., 683, 697."

We insist that the provisions of the pension law are plain and clear and that petitioner was a police officer within the meaning of that act and cannot be deprived of his Federal rights thereunder by any decision of the State Court that he is not such officer. We insist that this is a cognizable mistake and cannot and should not be followed by this Court. Upon that question the opinion of the Supreme Court of Illinois is silent and it has seen fit to dismiss the petition without specifically passing upon it otherwise than as included within the general deduction that petitioner is not a police officer. If he is not a police officer within the meaning of the Pension Act, who are meant by these words in that Act? If ever language was plain, clear and unmistakable, then the reference to police officers under the Pension Act includes petitioner. Furthermore, for ten years he has paid each month from his salary a certain percentage into that fund under the expectation that he would be entitled eventually to the provisions for his benefit in said Act; and that

the city would proceed under the provisions and by the method provided in the Act, if his dismissal were sought. As we have mentioned before, this Act has not been repealed but is in full force and effect within the State of Illinois. To attempt to overcome the effect of plain language which distinctly mentions and includes within its phraseology police officers, by saying that there is no such thing as a police officer in Illinois, is so arbitrary and unfounded as to entitle it to be disregarded by this Court. Certainly such a conclusion by the Supreme Court of Illinois will not conclude this Court in passing upon the Federal question in the record clearly set up and as clearly denied by the Supreme Court of Illinois, not in express terms but none the less deadly because of its silence upon that point.

It is argued, in the brief of defendants in error upon this motion, that the decision of the State Court is rested upon an independent non-federal ground sufficient to sustain the judgment, and that, therefore, this court is not called upon to consider the Federal questions in the case. The basis of this contention is that the State Court included within its opinion a holding that plaintiff in error was guilty of "laches."

We do not question the decisions which hold that this court is concluded by the decision of the State Court in an equity suit as to whether or not certain facts render complainant guilty of laches. The cases cited by defendants in error are of that character. But the so-called "laches" in this case are not laches at all and the claim is unfounded and entirely un-

sound. Furthermore, there is no independence furnished upon which such a claim can be founded. The question which the State Court desired to characterize as "laches" is really one of discretion, and the granting of the writ is considered to be a matter of discretion with the court, and furthermore, the judgment of that court is not rested upon this claim.

In Illinois *mandamus* is a statutory remedy, is a civil action by a statute enacted in 1874 (Rev. Stat. Ill. (1909), Ch. 87, p. 1161) entitled "An Act to revise the law in relation to mandamus," providing that upon the filing of a petition for a mandamus the clerk of the court shall issue a summons commanding the defendant to appear at the return term thereof and show cause why a writ of mandamus should not be issued against him.

We quote the following pertinent sections from the statute:

> "4. PLEADINGS. Section 4. The petitioner may plead to or traverse all or any of the material facts contained in the answer, or demur thereto, to which the defendant shall reply, take issue or demur, and like proceedings shall be had *as in other cases at law*."
>
> "8. SUIT NOT TO ABATE FOR DEATH, ETC. Section 8. The death, resignation or removal from office, by lapse of time or otherwise, of any defendant, shall not have the effect to abate the suit, but his successor may be made a party thereto, and any peremptory writ may be directed against him."
>
> "9. SUIT NOT DISMISSED FOR BETTER REMEDY—AMENDMENTS. Section 9. The proceedings for a writ of mandamus shall not be dismissed nor the writ denied because the petitioner may have

another specific legal remedy, where such writ will afford a proper and sufficient remedy; and amendments may be allowed *as in other civil suits.*"

"10. APPEALS—WRITS OF ERROR. Section 10. Appeals and writs of error may be taken and prosecuted in the same manner, upon the same terms, and with like effect *as in other civil cases.*"

Civil actions in Illinois are regulated by the following provision in the Statute of Limitations of that state (Rev. Stat. Ill. (1909), Ch. 43, p. 1446):

"And all civil actions not otherwise provided for shall be commenced within five years after the cause of action accrues."

At this point we desire to call attention to the fact that the limitation statute was passed in 1872 and the Act to revise the proceedings in *mandamus* in 1874.

The opinion in the case at bar does not pass upon the so called question of "laches" except by reference to the cases of *Kennedy* v. *City of Chicago*, 220 Ill. 485, and *Schaltheis* v. *City of Chicago*, 240 Ill., 167. In the *Schaltheis* case, no mention is made of the Statute of Limitations or of "laches" so that this reference is clearly an inadvertence on the part of the State Court. In the *Kennedy* case, it was decided that the delay of *more* than the statutory period (five years) could be considered as fatal, but the contention of petitioner, that *mandamus* is a civil action under the laws of Illinois and is governed by the Statute of Limitations applicable thereto, is treated as follows (p. 505):

"The theory of this contention is that, if the doctrine of laches is applied, it must follow the

period fixed by the Statute of Limitations, and that the Statute of Limitations applicable to such cases is said by counsel for appellant to be the five years' statute of limitations. In support of this decision, the latter clause of Section 15 of this limitation Act is invoked which reads as follows:

'And all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrues.' (2 Starr & Curt. An. Stat., 2nd Ed., p. 2625.)

Without passing any opinion upon the correctness of the contention of counsel upon this subject, it may be admitted, for the purposes of this case, that a delay of five years must have occurred in order to substantiate the charge of laches against the appellant."

And at the conclusion of the opinion it is said:

"Inasmuch, therefore, as appellant has waited more than five years before filing a petition for mandamus, which sets up a good cause of action, * * * we are of the opinion that the appellant has been guilty of such laches, as authorized the Circuit Court to refuse to grant the writ."

The delay in the case just mentioned was *more than six years* and the previous decisions of the State of Illinois to the effect that *mandamus* is a civil action and is governed by the pertinent section of the statute of limitations above quoted are not questioned.

It has been held in Illinois in unmistakable terms that *mandamus* is a civil action.

Langan v. *Drainage District*, 239 Ill., 430, 438.

Cleary v. *Hoobler*, 207 Ill., 97, 99.

Mayor of Roodhouse v. *Briggs*, 194 Ill., 435.

Chicago Great Western Ry. Co. v. *People*, 179 Ill., 441.

It is said in *Langan* v. *Drainage District, supra* (a *mandamus* case):

> "With reference to the Statute of Limitations, it is only necessary to say this is an action at law and is governed by the rules of pleading applicable to other actions at law. (Citing cases.) In such actions the Statute of Limitations cannot be availed of by demurrer but must be specially pleaded, so that the plaintiff may reply on special matter which prevents the bar from attaching. (*Gunton* v. *Hughes*, 181 Ill., 132; *Wall* v. *Chesapeake & Ohio R. R. Co.*, 200 Ill., 66.)"

This being so by statute and also by judicial decision there is no question that the limitation statute operates upon *mandamus* proceedings in Illinois.

The State Court can not make another or different limitation period apply to the case at bar. It was decided by this court, in *Amy* v. *Watertown* (No. 2), 130 U. S., 320, 323, that the statute, as written, must prevail. We quote the following language from the opinion by Mr. Justice Bradley:

> "The question, therefore, is, whether the courts can create another exception, not made by the statute, where the party designedly eludes the service of process? Have the courts the power thus to add to the exceptions created by the statute? * * * The observation is undoubtedly correct; but the cases in which it applies are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it. The general rule is that the language of the act must prevail, and no reasons based on apparent inconvenience or hardship can justify a departure from it."

In some jurisdictions *mandamus* is not a civil action. An interesting discussion of this question is found in the case of *Duke* v. *Turner*, 204 U. S., 623, 628, and we quote the following from the opinion in that case:

> "The authorities are much in conflict as to whether a statute of limitations, without express words to that effect, governs a proceeding in *mandamus* as though it were an ordinary civil action. Some of the cases hold that the statute of limitations applies which would govern an ordinary action to enforce the same right.
>
> Other cases hold that the statute of limitations does not apply as it would to ordinary civil actions, but the relator is only barred from relief where he has slept upon his rights an unreasonable time, particularly when the delay has been prejudicial to the rights of the respondent. The cases *pro* and *con* are collected in a note to Section 30-b. High, Extraordinary Legal Remedies, 3d ed."

It was decided by this court in the case just mentioned that under the laws of Oklahoma Territory, *mandamus* was not a civil action and the various provisions of the local statutes are examined to arrive at a correct solution of the question presented. An examination of the text quoted from shows that where the proceeding is made a civil action by statute, the statute of limitations governing other civil actions applies and the case of *Board of Supervisors* v. *Gordon*, 82 Ill., 435, is cited in support of that view. For other cases to the same effect we desire to call the attention of the court to

People v. *Town of Oran*, 121 Ill., 650.

Meents v. *Reynolds*, 62 Ill. App., 17.

Town of Oran v. *The People*, 19 Ill. Apps. 174.

Irrespective of the decisions, it is so clearly regulated and provided by the statute of 1874, from which we have quoted, that there is no possible escape from the plain meaning of the language therein employed that in Illinois *mandamus* is a civil action.

There is no possible claim of "laches" as to the pension fund question. That part of the case was avoided by the State Court, further evidence that such claim is clearly untenable.

Having established, as we trust, that *mandamus* is a civil action or an action at law, we feel confident in saying that *laches* plays no part and cannot be considered in this connection. It was held by this Court in the case of *Wehrman* v. *Conklin*, 155 U. S., 314, 326, as follows:

> "It is scarcely necessary to say that complainants cannot avail themselves *as a matter of law* of the laches of the plaintiff in the ejectment suit. Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed."

The opinion proceeds to explain that if the limitation period were twenty-one years plaintiff could wait twenty years and eleven and a half months before proceeding and the defendant could make nothing of the delay. To the same effect is *Abraham* v. *Ordway*, 158 U. S., 422.

We, therefore, insist that the so-called independent ground is not independent, is unsound and the decision of the State Court is not rested upon it. The claim of laches, in equity, concedes the existence and validity of a right, but says that delay in assert

ing it is fatal. The gist of plaintiff in error's action is the right acquired by enrollment on the part of the Civil Service Commission and as to it, the State Court expressed no opinion.

With the law in Illinois in the condition in which we have shown it to have been, when plaintiff in error's petition was filed, there is no force in the claim of "laches." His action was governed by the statutory period of five years, and there being this period of repose, he was entirely justified to delay instituting suit so long as there was no expiration of such period.

Furthermore, it has been held in Illinois that the statute of limitations must be raised by plea and cannot be urged upon demurrer for the reason that the plaintiff can have an opportunity to overcome the effect of the plea if made. A special demurrer will lie if the declaration contains matter in avoidance set up in advance of a plea of the statute of limitations. (*Longan* v. *Drainage District*, *supra*.)

The injustice to be visited upon petitioner if the doctrine of laches is to be arbitrarily injected into this case is at once apparent. We feel that we have demonstrated that the so called claim of "laches" is too weak and thin to constitute a ground for defeating the jurisdiction of this Court. If the statute of limitations had been pleaded in the lower court, petitioner would have had an opportunity to show matter in resistance to the plea.

Where there is a clear Federal question in the case and the attempt is made to defeat the jurisdiction of this Court by a claim of an independent

ground of local or general law sufficient to sustain the judgment, this Court will examine such question to see whether it is sound and well founded. And the State Court cannot arbitrarily inject such a ground into its opinion to defeat the jurisdiction of this Court.

Leathe v. *Thomas*, 207 U. S., 93, 99.
Johnson v. *Risk*, 137 U. S., 300, 307.
Terre Haute & Indianapolis R. R. Co. v. *Indiana*, 194 U. S., 579.

In conclusion, we respectfully request that plaintiff in error be given a full and fair opportunity to present the merits of his petition before this Court. The Federal questions presented have been properly raised and are meritorious, and the argument will demonstrate the absolute soundness of the contentions made by the plaintiff in error. The decision of the State Court in denying the Federal rights set up is founded upon a misconception and a narrow view of the guaranties of the Federal Constitution. The Federal questions, clearly presented, prevent the writ of error from being dismissed, and we desire to be heard before the judgment of the State Court is affirmed.

Respectfully submitted,

A. B. Chilcoat,
Stephen A. Day,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1910.

No. ~~444~~ 195.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.,
Defendants in Error.

Brief of Argument and Argument of Plaintiff in Error.

A. B. CHILCOAT,
Attorney for Plaintiff in Error.

22,461.

Geo. Hornstein Co., Printer, Chicago.

Supreme Court of the United States

OCTOBER TERM, A. D. 1910.

No. 840.

CHARLES T. PRESTON,
Plaintiff in Error,

vs.

THE CITY OF CHICAGO et al.,
Defendants in Error.

Brief of Argument and Argument of Plaintiff in Error.

Your petitioner, Charles T. Preston, of the City of Chicago, in the said county, respectfully represents and states to said court as follows:

That the "City of Chicago" is, and has been for more than twenty years last past, a municipal corporation in said Cook County, and State of Illinois, incorporated and organized under an act of the Legislature of said state, entitled "an Act to provide for the incorporation of cities and villages, approved April 10, 1872, in force July 1, 1872, and existing subject to said act and the several acts amendatory thereof.

That Carter H. Harrison is now and ever since the month of April, 1897, has been the mayor of said City of Chicago, duly elected and acting as such mayor.

That from the 18th day of April, 1881, there has been and still is an "Executive Department of the Municipal Government of said City of Chicago," known as the department of police, which department was created by an ordinance of said City of Chicago and by which ordinance said executive department was made to and does embrace "the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been, or may be, prescribed by ordinance."

That by the ordinance creating said "Executive Department" there was created the office of "Superintendent of police," which superintendent, by provisions of said ordinance, was to be appointed by the mayor of said city, by and with the advice and consent of the city council of said city, on the first Monday in May, 1881, "or as soon thereafter as may be," and biennially thereafter.

That Joseph Kipley was on, to-wit, the first Monday of May, 1897, duly appointed by the mayor of said City of Chicago, as such superintendent of police of said City of Chicago, until the 30th day of April, 1900, when he resigned said office and Francis O'Neil was duly appointed as such superintendent of police, which office he still holds.

That on, to-wit, the 1st day of June, 1886, your

petitioner was a citizen of the United States, 39 years of age, and for more than two years next previous to said 1st of June, 1886, he had been a resident of the City of Chicago, in said State of Illinois, and was a qualified elector of said city, and had never been a defaulter to said municipal corporation, said City of Chicago. That on, to-wit, said 1st day of June, 1886, your petitioner was duly appointed to the office of police patrolman in said department of police in said City of Chicago, and thereupon he took the oath of office prescribed for such police patrolman to take, and at once entered upon his official duties as such police officer of said City of Chicago.

That your petitioner served continuously as such police patrolman from said 1st day of June, 1886, until, to-wit, the 14th day of March, 1898, and hath remained such police patrolman from thence hitherto.

That on, to-wit, December 18, 1897, by direction of the then superintendent of police (said Joseph Kipley), your petitioner took what is called the civil service examination as to his qualifications for the office of policeman of said City of Chicago, which examination was conducted by and under the direction of the civil service commissioners of the City of Chicago (said City of Chicago having theretofore duly adopted the "Civil Service Act" so-called, being an act of the Legislature of the State of Illinois, entitled "An Act to Regulate the Civil Service of Cities," approved and in force March 20, 1895, and the mayor of said city having theretofore ap-

pointed, under the provisions of said act, civil service commissioners, and said City of Chicago being then under said Civil Service Act and governed thereby); upon which examination your petitioner was "passed" as duly qualified for the office of policeman of said city, standing upon such examination 84 on list upon a scale of 100, and standing No. 96 upon the list of "eligibles."

That afterwards, to-wit, on the 14th day of March, 1898, as your petitioner is informed and believes, and upon such information and belief states the fact to be, the said Joseph Kipley, as such superintendent of police of said City of Chicago, directed the name of your petitioner to be dropped from the payroll of the policemen of said City of Chicago, and thereupon, by and under such direction, the name of your petitioner was dropped from said pay-roll; that from thence hitherto the superintendent of police of the City of Chicago, has caused the name of your petitioner to be omitted and excluded from the pay-roll of the police department of the City of Chicago; and still so causes the name of your petitioner to be omitted from said payroll. That the said conduct of the said superintendent, in so causing the name of your petitioner to be omitted and excluded from the said payroll, was and is wholly unauthorized, invalid and contrary to and in disregard of the legal rights of your petitioner.

That in consequence of the wrongful action of the said Joseph Kipley, aforesaid, in causing the omission and exclusion of your petitioner's name from the police payrolls of the City of Chicago, your

petitioner has not been paid any portion of the salary accruing and due to him as police officer as aforesaid, from, to-wit, said 14th day of March, A. D. 1898, until the present time.

That your petitioner has made demand upon the said City of Chicago, and upon the said Carter H. Harrison, mayor thereof, and upon the said Joseph Kipley, as superintendent of police of said city, while he was such superintendent, that petitioner's name should be restored to the police pay-rolls of said city, to the end that your petitioner might be enabled to draw the salary due him as police officer, alike the salary already accrued and due him and the salary accruing to him from month to month as such police officer of said City of Chicago, to which he is justly and lawfully entitled; but that the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph H. Kipley as superintendent of police thereof, respectively refused to comply with your petitioner's reasonable and lawful demand in the premises and still do refuse so to do. That no part of the salary

7 so accruing and due to your petitioner as aforesaid from said 14th day of March, A. D. 1898, until the present time, has ever been paid to your petitioner, although your petitioner has made demand therefor upon said City of Chicago, and upon said Carter H. Harrison as mayor of said city. And in this behalf your petitioner shows that under the provisions of the laws and ordinances of the said City of Chicago the salary to which your petitioner was lawfully entitled from said 14th day

of March, A. D. 1898, until the present time was the sum of $83.33 per month, less one per cent thereof, which under the provisions of the Police Pension Act, so-called, in force during the period aforesaid, should be deducted by the police pension board or other proper authority of the said City of Chicago, from the salary of your petitioner, and paid into the police pension fund of said city.

And in this behalf your petitioner further shows that from the time of his appointment as a police officer of said city until the said 14th day of March, A. D. 1898, there had been and was deducted from the salary of your petitioner and paid into the Police Pension Fund, so-called, under the provisions of existing laws, the sum of one per cent, from each monthly payment of salary accruing to your petitioner; and that under the provisions of said law your petitioner was and is entitled to share in the benefits and advantages of said police pension fund.

And your petitioner further shows that by Section 3 of said Civil Service Act it was expressly provided and required as follows:

"Said commissioners shall classify all the offices and places of employment in said city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act. The offices and places so classified by the commission shall constitute the classified civil service of said city, and no appointments to any such offices or places shall be made except
8 under and according to the rules hereinafter mentioned."

It was further provided by Section 4 of said Civil Service Act as follows:

"Said commission shall make rules to carry out the purposes of this act, and for examination, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

Your petitioner further, upon information and belief, states that soon after the organization of said commission in accordance with the terms of said act, the said commissioners proceeded to classify as required, the various offices and places of employment of said City of Chicago, with reference to examinations provided for in said act, and said commission did, in fact, constitute the classified civil service of said city; that such classification was made under and by virtue of said act and the rules adopted by said civil service commission; and that by Rule 1, Section 1, of said civil service commission, in force during the entire period of the year 1898, and also theretofore in force and effect, it was provided that said commission "do hereby classify all the offices and places of employment in said city," except the excepted offices, among others, as follows: "2,504 patrolmen in the department of police at $1,000 per annum"; which classification will more fully and at large appear upon an inspection of said rules, ready to be produced.

Your petitioner further shows that by Sections 31 and 32 of said Civil Service Act, it is provided as follows: Section 31, comptroller to pay salaries only after certification. No comptroller or other auditing officer of the city, which has adopted this act, shall approve the payment of or be in any manner concerned in paying any salary or wages

to any person for services as any officer or employe of such city, unless such person is occupying an office or place of employment, according to the provisions of law, and is entitled to payment therefor.'

Section 32. Paymasters, etc., to pay salaries only after certification. No paymaster, treasurer, or other officer or agent of the city, which has adopted this act, shall willfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employe of such city unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

Your petitioner further shows that the first board of civil service commissioners, in 1895, at the
9 request of the chief executive officers of the said City of Chicago and the comptroller of said city adopted the practice of passing upon and certifying all pay-rolls of the employes of said City of Chicago, including the payrolls of all police patrolmen in the employ of said city, which practice has continued from thence hitherto; and it was then and ever since has been required by the comptroller of said City of Chicago, and by said board of civil service commissioners, that all pay-rolls in the City of Chicago, including the police pay-roll, should be so certified as a condition of payment thereof.

And your petitioner states that by said certification it was in legal effect declared by said board of civil service commissioners that all persons whose names were upon said pay-rolls so certified, were entitled to be paid, as persons who are holding office under said Civil Service Act; and by the payment of said

pay-rolls so certified, by the comptroller and other officers of said city, such officers and said Chicago, in legal effect, admitted that all persons whose names were upon such pay-rolls, were occupying an office or place of employment under and according to the provisions of said Civil Service Act and entitled to payment thereunder as being in the classified civil service of said city, under said act.

And your petitioner further shows that for more than two years next prior to December 18, 1897, your petitioner was duly carried upon the police pay-rolls of said city, and from month to month was duly certified by said civil service commission, as a police patrolman entitled to pay as such, under said Civil Service Act; and that after your petitioner had taken successfully his civil service examination on December 18, 1897, and had passed the same as hereinbefore stated he continued to be certified by said civil service commission upon the police pay-rolls of said city, as a member of the classified civil service of said city, and to be paid by said city as an officer or employe of said city entitled to pay for such services under said Civil Service Act.

And your petitioner insists that the said City
10 of Chicago, said Carter H. Harrison as mayor of said city, and said Francis O'Neil as superintendent of police of said city, are, respectively, estopped by the law and the facts hereinbefore stated and set forth, to now deny that your petitioner was on the 14th day of March, 1898, and from thence hitherto has been a police patrolman in the classified civil service of the said City of Chicago, under said Civil Service Act, and was then and there entitled to

all the privileges and protection afforded by said act.

Your petitioner further states that the civil service commissioners now in office as such under said Civil Service Act, are Joseph Powell, Christian Meier and Julian W. Mack.

And your petitioner further shows that by the appropriation made by the Common Council of the City of Chicago, to-wit, in the month of December, A. D. 1897, for the payment of the employes of said city, and for other municipal purposes for the year 1898, there was an appropriation made for the partolmen then, to-wit, in December, 1897, upon the police pay-rolls of said city, and so in the classified civil service as aforesaid, including among the number of such patrolmen your petitioner. And your petitioner avers that in like manner, to-wit, in or shortly after the month of December, in the respective years 1898, 1899, 1900, 1901, and 1902, there were further appropriations made by said city for the payment of police patrolmen in the classified civil service of said city for said years respectively, and that your petitioner was entitled under said appropriations to be taken and carried upon said pay-rolls for said years 1898, 1899, 1900, 1901, 1902 and 1903, unless during said year 1903 he shall be lawfully discharged from the police force of said city, as being in the employment of said city in the classified civil service.

Wherefore your petitioner prays a writ of mandamus under the seal of said court directed to said City of Chicago, and to said Carter H. Harrison, as mayor of said City of Chicago, and to Francis O'Neil, as superintendent of police of said City of Chicago;

and to Joseph Powell, Christian Meier and
11 Julian W. Mack, as civil service commissioners
of the City of Chicago, commanding said City of Chicago, said Carter H. Harrison, as mayor of said City of Chicago, and said Francis O'Neil, as superintendent of police of said City of Chicago, as follows:

To forthwith place the name of your petitioner upon the roster of police patrolmen, and upon the police pay-roll, of said City of Chicago, to the end that your petitioner may hereafter draw the pay due your petitioner as a police patrolman of said city from time to time, as the other police patrolmen in said City of Chicago are paid.

And commanding said Joseph Powell, Christian Meier, and Julian W. Mack, as civil service commissioners of said City of Chicago, as follows: To certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever such name shall hereafter appear as such police patrolman upon any pay-roll of policemen, presented to said civil service commissioners by the proper offices of said City of Chicago, for certification thereof, to the end that your petitioner may hereafter draw the pay due him as a police patrolman of said city as other police patrolmen are paid.

Your petitioner asks that such further order may be made in the premises, as justice may require, etc.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Charles T. Preston, being duly sworn on oath says that he is the petitioner named in the foregoing peti-

tion, and which is subscribed by him; and that the several matters and things in said petition contained are true to the best of his knowledge, information and belief.

CHARLES T. PRESTON.

Subscribed and sworn to before me this 9th day of March, A. D. 1903.

.....,
Notary Public.

Your petitioner, Charles T. Preston, of the City of Chicago, in the County of Cook, and State of Illinois, represents and states to this court as follows:

That on, to-wit, the 13th day of February, 1863, the People of the State of Illinois, represented in the General Assembly, duly passed an act to reduce the charter of the City of Chicago, and the several acts amendatory thereof into one act, and revised the same. That by different sections of Chapter X of said act, provisions were made as follows, to-wit:

"Section 1. There is hereby established an executive department of the municipal government of said city to be known as the board of police. Said board shall consist of three commissioners, in addition to the mayor, who shall be *ex officio* a member thereof, to be chosen in the manner hereinbefore prescribed; and a majority of said board shall constitute a quorum for the transaction of business. * * *

"Section 4. Said board shall assume and exercise the entire control of the police force of said city, and shall possess full power and authority over the police organization, government, appointments, and discipline within said city. * * *

"Section 6. The duties of the police force shall be
execu[ted] under the direction and control of said
board, and according to rules and regulations which
it is h[ereby] authorized to pass from time to time, for
the n[more] proper government and discipline of its
subor[dinate] officers and the police force of the city.
The s[said] police force shall consist of a superintendent
of po[lice], three captains of police, six sergeants, nine-
ty police patrolmen, and as many more police
19 [patrolmen] as may be authorized by the common
c[council] on application by this board. *The several offices hereby created* shall be severally filled by appointments in the mode prescribed by this act. And each person so appointed shall hold office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city.
* * *

"Section 7. The qualification, enumeration and distribution of duties, mode of trial and removal from office, of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; provided, however, that no person shall be appointed to or hold office of superintendent of police without the advice and consent of the common council to every such appointment; nor shall any person be appointed to or hold office in the police force, aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, provided, that no person shall be removed therefrom except upon *written charges* preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; but the board of police shall have power to suspend any member of the police department of the city pending the hearing of the charges preferred against him: And, provided, that when any vacancy shall occur in

the force of captain of police, the same shall be filled by appointment from among the persons then in office, as sergeants of police, and a like vacancy in the office of sergeant of police shall be filled by appointment from among the persons then in office as police patrolmen."

Said police force so continued until the aforesaid act was amended by the Legislature of the State of Illinois, February 16, 1865, when the foregoing sections, six and seven, were repealed, and Sections 15, 16 and 19 of the Act of 1865, were passed. The said sections read as follows:

"Section 15. The duties of the police force shall be executed under the direction and control of said board, and according to rules and regulations which it is hereby authorized to pass, from time to time, for the more proper government and discipline of its suboridinate officers and the police force of said city. The said force shall consist of a general superintendent of police, one deputy superintendent of police, three captains of police, sergeants of police not exceeding twelve, and as many more police patrolmen, not exceeding two hundred, as may be authorized by the common council, on the application of the board of police commissioners, and each patrolman so appointed, shall hold his office only during such time as he shall faithfully observe and execute all the rules and regulations of said board, the laws of the state, and the ordinances of the city: Provided, that for incompetency, neglect of duty or other sufficient cause, the said board may at any time, remove the superintendent and deputy superintendent of police or the fire marshal and assistant fire marshal.

"Section 16. The qualification, enumeration and distribution of duties, mode of trial and removal from office of each officer of said police force, shall be particularly defined and prescribed by rules and regulations of the board of police; nor shall

any person be appointed to or hold office in the police force aforesaid, who is not a citizen of the United States, or who shall not have resided within the State of Illinois two years next preceding his appointment, or who shall ever have been convicted of crime: And, provided, that no person shall be removed therefrom, except upon *written charges* preferred against him to the board of police, and after an *opportunity shall have been afforded him of being heard in his defense;* but the board of police shall have power to suspend any member of the police department of the city, pending the hearing of the charges preferred against him. And, provided, that whenever any vacancy shall occur in the office of captain of police, the same shall be filled by an appointment from among the persons then in office as sergeants of police; and a like vacancy in the office of sergeant of police shall be filled by appointment from among persons then in office as police patrolmen.

"Section 19. From and after the passage of this act the mayor of said city shall cease to be in any manner a member of the board of police and of the board of public works of said city."

The said police force continued under the control of the police board aforesaid, until, to-wit, the adoption by the Legislature of the State of Illinois, of the General Act to provide for the incorporation of cities and villages, approved April 10, 1872, and which act was adopted by the City of Chicago, April 23, 1875.

That by said act it was amongst other things provided as follows, to-wit:

"Section 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the changes of the organization under this act; and from the time of such organization or change of organization the

prisions of this act shall be applicable to such cits and villages, and all laws in conflict therewith sh no longer be applicable. But all laws or parts of ws, not inconsistent with the provisions of this actshall continue in force and applicable to any suc city or village, the same as if such change of orgnization had not taken place."

hat by Section 1 of Article V of said act it was, amgst other things, provided as follows:

' * * * The city council in cities and the prident and board of trustees in villages shall have theollowing powers: * * *

'Sixty-six. To regulate the police of the city or villge, and pass and enforce all necessary police ordnances. * * *

'Sixty-eight. To prescribe the duties and powers of superintendent of police, policeman and watchman"

That afterwards, to-wit, on the 28th day of June, 1875, the city council of the City of Chicago duly passed an ordinance approved by the mayr, for the reorganization of the police departmer of the city. The ordinance contained seventeer sections, and those deemed material, in this caue, are as follows:

'Be it ordained by the city council of the City of Chiago:

"Section 1. There is hereby established and creed a department of the municipal government of sid city, to be known as the departnent of the polie. * * *

"Section 2. There is hereby created the office of city marshal of said city. The term of said office shal be for the term of two years commencing with

July 1st, 1875, and the salary attached to said office shall be $4,000 per annum. The city marshal shall be appointed by the head of the police department, and shall give a bond with security to be approved by the mayor, in the sum of $25,000, conditioned for the faithful performance of the duties of the office, and shall well and truly account for and pay over all moneys, and surrender any and all property, books, and papers which may come into his hands as said city marshal, on the expiration or sooner termination of his term of office. He shall, as such head of the police department (subject to all the general ordinances of the city), *assume and exercise the control of the police force of the city*, and shall possess full power and authority, subject to all general ordinances of the city council, *over the police organization, government, appointments*, and discipline within said city, and shall have the custody and control, subject to the direction of the comptroller, of the public property, books, records and equipments belonging to the police department. * * *

"Section 5. The said force shall consist of one general superintendent of police, one deputy superintendent of police, four captains of police, twenty sergeants, and the police patrolmen now in the employ of the city, which may be increased or decreased in number from time to time, or any police patrolman may at any time be removed and discharged from the police force by the superintendent of the force, with the concurrence of the city marshal. The deputy superintendent and sergeants may be removed and discharged or reduced in rank by the city marshal, with the written concurrence of the mayor of the city; provided, however, that the office of deputy superintendent shall be discontinued and cease to exist after the present fiscal year. All the members of the police force shall take an oath to faithfully discharge their duties. * * *

"Section 17. The police force as heretofore existing, shall continue to be the police force until otherwise changed by this ordinance, but the board of police, and the office theretofore known as that of the commissioner of the board of police of the City of Chicago, shall cease to exist, and no duties shall hereafter be performed or power or authority exercised in connection with said police force by said board or any commissioner of the board of police of said city, after the passage of this ordinance."

That afterwards, to-wit, on the 13th day of
22 April, 1881, the city council of the City of Chicago duly passed an ordinance of said city, which ordinance was approved on the 18th day of April, 1881. Said ordinance appears in the municipal code of Chicago, published by authority of the city council in the year 1881, Chapter VIII. Said ordinance, among other things, provided as follows, to-wit:

"730. There is hereby established an executive department of the municipal government of the City of Chicago, which shall be known as the department of police, and shall embrace the superintendent of police, a secretary to said superintendent, one captain of police for each district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been or may be prescribed by ordinance.

"731. There is hereby created the office of superintendent of police, who shall be the head of said department of police, and shall hold his office for the term of two years, and until his successor shall be appointed and qualified. * * *

"734. The superintendent shall have the management and control of all matters relating to the department, its officers and members; *and, with the consent of the mayor, he shall appoint all officers and*

members of said department; provided, that all captains shall be appointed from members of the police serving as lieutenants, all lieutenants from members serving as sergeants, and all sergeants from members serving as patrolmen.

"735. Said superintendent shall have the power to remove from the police force any police patrolman at his pleasure, and, with the concurrence of the mayor, he may remove, or reduce in rank any officer or member of said department. * * *

"750. The superintendent shall hear and determine all cases for the violation of any rule, regulation or order of said department, or other breach of discipline, and shall have power to punish the offending party by reprimand, forfeiture, and withholding pay for a specified time, or dismissal from the force; but no more than ten days' pay shall be forfeited and withheld for any offense.

"751. The superintendent of police may prefer written charges, without oath, for any violation of the police rules, regulations or orders, against any police officer or patrolman upon the regular police force, upon his own knowledge, or upon written information communicated to him by any member of the police department.

"752. During the pending of charges against any police officer or patrolman upon the police force, the superintendent may suspend from duty any such officer or patrolman until such charges can be examined."

Your petitioner states that he is advised, and
23 avers the facts to be, that said Sections 735 and 750 were upon the passage of said ordinance, void; and were and are of no force or effect, for the reason that the provisions thereof are directly at variance with the provisions of the statute of

the State of Illinois, pertaining to the removal of police patrolmen from the police force of said City of Chicago.

That the aforesaid provisions of said ordinance, so far as the same were valid, continued in force until the adoption by the legal voters of said City of Chicago, as hereinafter stated, of an act of the legislature of the State of Illinois, entitled, "An Act to Regulate the Civil Service of Cities," on, to-wit, the 25th day of March, 1895, and until, to-wit, the first day of July, 1895, when the then mayor of said City of Chicago, by his proclamation, declared the said act to be thereafter in full force and effect in said City of Chicago, as hereinafter stated.

Your petitioner further shows that at the municipal election in said City of Chicago, held in the month of April, 1887, John A. Roach was elected mayor of said City of Chicago, and having duly qualified, entered upon the duties of such office and became in law and in fact the mayor of said City of Chicago, and so continued to be such mayor, and acted as such for, to-wit, two years thereafter. That on, to-wit, the .... day of ....., 188.., one ..... was duly appointed by the then mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago, to the office of superintendent of police of said City of Chicago; and having duly qualified as such superintendent of police was, on the 1st day of June, 1886, performing the duties of such office of superintendent of police in said City of Chicago. That on said 1st day of June, 1886, the city council of said City of Chicago, had, by an ordi-

nance theretofore duly passed, and then in force, authorized the appointment of a large number of police patrolmen, to-wit, eleven hundred and eighty-one, for service on the police force in the police
24 department of said City of Chicago. Your petitioner further shows that on, to-wit, the 1st day of June, 1886, your petitioner was a citizen of the United States of America, thirty-nine years of age, and for more than two years next previous to said 1st day of June, 1886, had been a resident of said City of Chicago, and had never been a defaulter to said municipal corporation, said City of Chicago; and was then and there in all respects qualified and eligible for appointment to the office of police patrolman in said city.

That thereafter, on, to-wit, the 1st day of June, 1886, there was a vacancy in the number of police patrolmen authorized by the city council as aforesaid, and thereupon your petitioner was duly appointed to the office of police patrolman in the department of police in said City of Chicago by ...., the then superintendent of police of said City of Chicago, which appointment your petitioner then and there accepted, and took and subscribed the following oath of office, to-wit:

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, Charles T. Preston, having been duly appointed to the office of police patrolman, do solemnly swear that I will support the Constitution of the State of Illinois, and that I will faithfully discharge

the duties of such police patrolman according to the best of my ability. CHARLES T. PRESTON.

Subscribed and sworn to before me this 1st day of June, 1886.

....., *Notary Public.*

(Seal)

And thereupon, immediately after taking such oath of office, he entered upon the performance of his duties as such police patrolman, and continued thereafter in the discharge thereof until his further performance of such duties was wrongfully and unlawfully interrupted, as hereinafter stated and set forth.

And your petitioner avers that the office of police patrolman to which petitioner was appointed as aforesaid, was an office created by the said act of the legislature, passed February 13, 1863, and first above referred to, and by the amendments thereto passed by said legislature February 16, 1865, and secondly above referred to; which said two acts, so far as the provisions thereof created the office of police patrolman in and for said City of Chicago, continued in full force and effect as valid and existing laws of said state, at the time of your petitioner's appointment to said office as aforesaid; and that, in so far as said acts of said legislature created the office of police patrolman, they have never been repealed, but are still in full force and effect. And your petitioner avers that he in accepting said appointment to such office of police patrolman, and rendering service as aforesaid, relied upon said

Acts of 1863 and 1865 as having created said office of police patrolman; and petitioner now insists that said office, to which he was appointed, was in fact created by said acts; and that said acts are a full justification for the claim of your petitioner which he now makes, to-wit, that upon said appointment and taking of the oath of office as aforesaid, he then and there held the office of police patrolman, which had been created under said statutes of 1863 and 1865, and that he could only be removed from said office by proceedings in conformity with the provisions of said acts or amendments thereto; and that no such removal was ever attempted, as is hereinafter shown.

That your petitioner then and there became a police patrolman of said City of Chicago, and in the service of said city as such. That during all of the period of time between the 1st day of June, 1886, and said 14th day of March, 1898, your petitioner was

26 not only a police patrolman of said City of Chicago, duly appointed on the 1st day of June, 1886, by the then superintendent of police of said City of Chicago, with the consent of the then mayor of said City of Chicago, and continued in office as aforesaid, but he was, during all said period, recognized as being such police patrolman by the respective mayors of said City of Chicago, and the respective superintendents of police of said City of Chicago, and by the city council of said City of Chicago; and that no successor to your petitioner as such police patrolman was at any time during said period appointed; and said City of Chicago, during all of said period of years, duly appropriated the money

to pay the salary accruing to your petitioner as such police patrolman; and such salary was paid to your petitioner as such police patrolman, from time to time, to-wit, from the Month of June, 1886, to said 14th day of March, 1898.

Your petitioner further shows that an act duly passed by the Legislature of the State of Illinois, entitled, "An Act to Regulate the Civil Service of Cities," approved and in force March 20th, 1895, was pursuant to the provisions of law, submitted to the legal voters of the City of Chicago, for their adoption, at a general election held in said City of Chicago, on, to-wit, April 2nd, 1895. That at said election said act was adopted by the legal voters of said city; and thereupon, to-wit, on July 1st, 1895, George B. Swift, the then mayor of said City of Chicago, issued his proclamation in words and figures as follows, to-wit: "Whereas, under the provisions of an Act of the General Assembly of the State of Illinois, entitled 'An Act to regulate the Civil service of Cities' approved and in 'force, March 20th, 1895,' there was duly submitted to a vote of electors of the City of Chicago, at a general city election, held April 2nd, 1895, the proposition whether the city and its electors should adopt and become en-
27 titled to the benefits of said act; and, whereas, a large majority of the votes cast at such election were cast for such proposition and in favor of the adoption of said act; now, therefore, as required by said Act, I, George B. Swift, mayor of the City of Chicago, hereby declare that said act is in full force and effect in the City of Chicago from and after this date, and that in accordance with the pro-

visions thereof, I have this day appointed as the three civil service commissioners under said act, John M. Clark, for the term of three years; Robert A. Waller, for the term of two years; and Christopher Hotz, for the term of one year.

"Dated July 1st, 1895.

GEORGE B. SWIFT,
Mayor."

Your petitioner further shows that upon the adoption by the said City of Chicago of the said Civil Service Act, so-called, and its becoming operative in said city pursuant to law and under said proclamation of the mayor, dated July 1st, 1895, all laws, or parts of laws, and all ordinances and regulations of said City of Chicago, inconsistent with said act, were thereupon and thereby repealed by virtue of Section 37 of said Civil Service Act, so-called.

Your petitioner further shows that by Section 3 of said Civil Service Act, it is expressly provided and required as follows:

> "Said commissioners shall classify all the offices and places of employment in said city, with reference to the examination hereinafter provided for, except those offices and places mentioned in Section 11 of said act. The offices and places so classified by the commission shall constitute the classified service of such city; and no appointment to any such office or place of employment shall be made except under and according to the rules hereinafter mentioned."

It is further provided by Section 4 of the Civil Service Act, as follows:

> "Said commission shall make rules to carry out the purposes of this act, and for examina-

tions, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in the original rules."

And your petitioner further shows that by Rule 1 of said rules adopted by said civil service commissioners, it was among other things provided, as follows:

RULE 1.

CLASSIFICATION.

"1. Unclassified Service.—Section 11 of said act provides that the following offices and places of employment shall not be included in the classified service. Officers who are elected by the people, or who are elected by the city council pursuant to the city charter, or whose appointment is subject to confirmation by the city council, judges and clerks of election, members of the board of education, the superintendent of schools, heads of any principal department of the city, members of the law department and one secretary of the mayor.

"The offices and places above named shall constitute the unclassified service.

"2. Classified Service.—All other offices and places of employment in said city under the provisions of said act, whether permanent, temporary or substitute, shall constitute the classified service. With reference to the examinations hereinafter provided for, they are hereby classified under two general classes, to be known as Class A and Class B, respectively. This classification is based mainly upon nature of employment. The positions embraced in Class A will be chiefly those of a permanent character, while those in Class B will be more in the nature of temporary employment. The commission will decide as occasion may require, in which class and division any particular office or place of employment shall belong.

"3. Official and Labor Service.—Class A shall be known as the official service, and Class B shall be known as the labor service.

"4. Divisions and Grades.—For convenience in designation, in carrying on examinations, certifying for appointments and promotions, and in making removals, the official service shall be divided into divisions based upon the character of the service to be performed, and each division shall be divided into grades, based upon amount of compensation. The several divisions of the official service shall be as follows: * * *

"Division D.—Police Service.—All persons in the uniformed police force."

Your petitioner further, on information and belief, states that soon after the organization of said civil service commission, in accordance with the terms of said act, the commissioners proceeded to 29 classify, as required by said act, the various offices and places of employment of said City of Chicago; that such classification was made under and by virtue of said act, and the rules adopted by said Civil Service Commission. Your petitioner further avers that all policemen in said City of Chicago, including your petitioner, were, at the time of the adoption of said Rule 1, and at the time of said classification in the uniformed police force of said city, and by virtue of said act and rule of said commission and the classification thereunder, became and were classified in Division D of the said official service of said City of Chicago, under said Civil Service Act, and thereupon the offices and places of employment so classified by said Commission did "constitute the classified service of said City of Chicago." And your petitioner further shows that by said provi-

sion, the classification of the offices of police patrolmen of said City of Chicago, then and there held by them, the then incumbents of said offices, including your petitioner, then and there became police patrolmen, *de jure,* in the classified service of said City of Chicago, and your petitioner so continued from thence hitherto. And your petitioner further shows that by Sections 31 and 32 of said Civil Service Act, it is provided as follows:

"Section 31. No comptroller or other auditing officer of a city which has adopted this act shall approve the payment of, or be in any manner concerned in paying any person any salary or wages for services as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law, and is entitled to payment therefor.

"Section 32. No paymaster, or other officer or agent of a city which has adopted this act, shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for service as an officer or employe of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor."

And your petitioner further shows that the first board of Civil Service Commissioners appointed by the mayor of said City of Chicago, George B. Swift, July 1, 1895, in compliance with said Sections 31 and 32 of said Civil Service Act, passed upon and certified all the pay-rolls of the employes and officers of said City of Chicago, including the pay-rolls of all police patrolmen in the employ of the said City of Chicago; and it was then and ever since has been required by the comptroller of said City

of Chicago, and by the board of Civil Service Commissioners of said City of Chicago, as well as by Sections 31 and 32 of said Civil Service Act, that all pay-rolls in said City of Chicago, under said Civil Service Act, including the pay-rolls of police patrolmen of said City of Chicago, should be so certified as a condition of payment thereof. And your petitioner states that by said certification it was in legal effect declared by said board of Civil Service Commissioners, that every person whose name was on the pay-roll so certified was "entitled to be paid as a person occupying an office or place of employment" under and according to the provisions of said Civil Service Act, and "entitled to payment therefor as being in the Classified Civil Service of said City of Chicago, under said act.

And your petitioner further shows that at the time of the classification of the Civil Service of said City of Chicago, including all the positions in the uniformed police force of said city, in said department of police, provided by statute and ordinances of said city, and which classification was published and distributed by said Civil Service Commissioners to the public, such publication being made August 14, 1895, and which went into effect on Monday, August 18, 1895, your petitioner was a police patrolman and included in the uniformed police force of said City of Chicago, having been duly appointed by the superintendent of police of said City of Chicago, with the consent of the mayor of said City of Chicago, as aforesaid, and thereafter having taken the oath of office and qualified and acted as such police patrolman as aforesaid; and that he thereupon became by

virtue of his office as police patrolman in the police force then and there held by him, a member of the Classified Civil Service of said City of Chicago,
31 as an office *de jure*, and thereafter so continued, to-wit, from thence hitherto; and that he has never been legally discharged or separated from the office of police patrolman in the Classified Civil Service of said city, or deprived of his office, as said police patrolman, by due process of law.

And your petitioner further shows that for more than two years next prior to the 14th day of March, 1898, your petitioner was a police patrolman of said City of Chicago, and continuously performed the duties of such police patrolman, and was duly carried upon the pay-rolls of said City of Chicago, and from month to month was duly certified by said Civil Service Commissioners as a police patrolman entitled to pay as such under said Civil Service Act.

That at the municipal election held at the City of Chicago in April, 1897, Carter H. Harrison was duly elected mayor of said City of Chicago, and having duly qualified and entered upon the duties of such office, he became in law and in fact the mayor of said City of Chicago, and by re-election from term to term thereafter continued to be the mayor of said city until, to-wit, the month of April, 1905, when he was succeeded in the office of mayor of said City of Chicago by Edward F. Dunne, who was duly elected mayor of said city, and served as such from April, 1905, to the month of April, 1907, when he was succeeded in said office of mayor of the City of Chicago by Fred A. Busse, who is now the duly elected, qualified and acting mayor of said city.

That on, to-wit, the first Monday of May, 1897, Joseph Kipley was duly appointed by the then mayor of said City of Chicago, said Carter H. Harrison, as superintendent of police of said City of Chicago, by and with the consent of the city council of said city; and said Joseph Kipley, having duly qualified as such superintendent, entered upon the discharge of the duties of such office, and then and there became and was, by due appointment and re-
appointment, the superintendent of police from
32 the first Monday in May, 1897, until after the month of January, 1900.

That, to-wit, on the 14th of March, 1898, as your petitioner is informed and believes, and upon such information and belief states the fact to be, the said Joseph Kipley, as such superintendent of police of said city, illegally and without warrant of law, directed the name of your petitioner to be dropped from the pay-roll of police patrolmen of said city, and thereupon by and under such direction the name of your petitioner was dropped from said pay-roll; *that such action was taken without any charges having ever been preferred against your petitioner, and without any trial of any charges of any nature against him, nor was such action* because of any alleged misconduct on his part; and said action was taken *without the written concurrence of the then mayor of said City of Chicago.* That from thence the said Joseph Kipley, claiming to act in that behalf as superintendent of police of said city, during his term of office, caused the name of your petitioner to be omitted and excluded from

the pay-roll of the police department of the said city; and each and every one who has been duly and legally appointed to the office of superintendent of police of said city, from the month of January, 1900, up to and including the present time, has still caused, and so causes, the name of your petitioner to be excluded and omitted from said pay-roll. That said conduct of said Joseph Kipley, and those following him in office, as superintendent of police of said city, in so omitting and excluding the name of your petitioner from said pay-roll, was and is a wrongful denying to your petitioner of his legal rights, as a police patrolman of said city, to the emoluments of his said office, and was without due process of law.

That in consequence of the wrongful action of the said Joseph Kipley, and those who have followed him in office, as superintendent of police of said city, up to and including the present time, in causing the omission of your petitioner's name
33 from the pay-rolls of police patrolmen of said city, your petitioner has not been paid any portion of the salary accruing and due to him as a police patrolman as aforesaid from, to-wit, said 14th day of March, 1908, until the present time. And your petitioner has made demand upon the said City of Chicago, and upon said Carter H. Harrison, mayor of said City of Chicago, and upon Joseph Kipley, as superintendent of police of said City of Chicago, which demand was made during their said incumbency of their respective offices, that his name should be placed on, or restored to,

the payroll of police patrolmen of said City of Chicago, to the end that your petitioner might be enabled to draw the salary due him as a police patrolman, alike the salary already accrued to him, and the salary accruing to him from month to month as such police patrolman of said City of Chicago, to which he is justly and lawfully entitled; but the said City of Chicago, the said Carter H. Harrison, as mayor thereof, and the said Joseph Kipley, as superintendent of police thereof, and those who have followed him in said office as superintendent of police of the said City of Chicago, whom your petitioner makes defendants herein, have respectively refused to comply with your petitioner's reasonable and lawful demand in the premises, and still do refuse so to do. That no part of the salary so accrued and accruing and due your petitioner as aforesaid from said 14th day of March, 1898, until the present time, has ever been paid to your petitioner, *although your petitioner has made a demand therefor.*

Your petitioner further shows that under the provisions of the law of the state and the ordinances of said City of Chicago, the salary to which your petitioner was lawfully entitled from said 14th day of March, 1898, until the present time, was the sum of $83.33 per month, less 1 per cent thereof, which, under the provisions of the Police Pension Act, so-called, as a part of the statute law of the State of Illinois, in force during the period aforesaid,

34 should be deducted by the Police Pension Board or other proper authority of said City of Chicago, from the salary of your petitioner and paid

into the Police Pension Fund of said city. And in this behalf your petitioner further shows that from the time of his appointment as a police patrolman of said city, on, to-wit, the 1st day of June, 1886, up to and including the 14th day of March, 1898, there was, from time to time, deducted from the salary of your petitioner and paid into the Police Pension Fund, so-called, under the provisions of the then existing Police Pension Laws of the State of Illinois, the sum of 1 per cent from each and every monthly payment of salary accruing to your petitioner; and that under the provisions of said pension law; to which for greater certainty, and a fuller statement of the legal right thereby secured to your petitioner to share in said fund (to which he had therefore been required to, and therefore did, contribute as aforesaid), your petitioner prays to refer with the same effect as if said act, being then and still one of the public laws of the State of Illinois, were herein fully set forth and quoted.

And your petitioner says that the act of the said Joseph Kipley, as superintendent of police of said City of Chicago, in directing the name of your petitioner to be dropped from the pay-roll of police patrolmen of the said City of Chicago, as aforesaid, and in causing the name of your petitioner then and thereafter to be omitted and excluded from the pay-roll of the police department of said city, resulted in the denying to your petitioner his legal right to share in the benefits of said fund, and was and is wholly unauthorized and without due process of law. And your petitioner further shows that such

action of said Joseph Kipley, was and is contrary to Article 2 of the Constitution of the State of Illinois, which reads as follows, to-wit: "No person shall be deprived of life, liberty, or property, without due process of law." Such action was and is, also, contrary to Section 1 of Article XIV of
35 the Amendments to the Constitution of the United States of America, which reads as follows, to-wit: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without *due process of law, nor deny to any person within its jurisdiction the equal protection of the law.*"

And your petitioner further avers that the said defendants insist that the action of the said Joseph Kipley, superintendent of the police force of the City of Chicago, and of the said other defendants, in continuing to omit and exclude the name of your petitioner from the pay-roll of said city, and in omitting and excluding the name of your petitioner from the pay-roll of the police department of the said city, had and has the effect to deprive your petitioner of his opportunity and right to exercise the functions and duties of a police patrolman as a member of the Classified Civil Service of said City of Chicago, and to receive and enjoy the salary pertaining to the office of police patrolman of said City

of Chicago, so held by him; which claim of said defendants, and their conduct in the premises, was and is a wrongful denying to your petitioner of his legal rights and without due process of law; and defendants thereby deny to your petitioner the equal protection of the law. And your petitioner insists that the said City of Chicago, the mayor of said City of Chicago, and the superintendent of police of said City of Chicago, are respectively estopped by law and by the facts hereinbefore stated and set forth, to now deny that your petitioner was, on the said 14th day of March, 1898, and from thence hitherto has been, and still is, a police patrolman in the Classified Civil Service of said City of Chicago, under said Civil Service Act, *and that as such he was, and is, as such police patrolman, entitled to all the benefits and protection afforded by said Civil Service Act, and particularly to the* 36 *benefits and protection of the provisions of said act governing the removal or discharge from said service of police patrolmen of said City of Chicago, in the classified service thereof.*

Your petitioner further states that before the filing of his said petition herein, the said Joseph Kipley was succeeded in the said office of superintendent of police of said City of Chicago by Francis O'Neil, who was duly appointed superintendent of police of said City of Chicago by said Carter H. Harrison, the then mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago; and that after the filing of your petitioner's petition herein, the said Francis O'Neil was succeeded in the office of superintend-

ent of police of said City of Chicago by John M. Collins, who was duly appointed such superintendent of police of said City of Chicago, by said Edward F. Dunne, who was, at the time of such appointment, the duly elected, qualified and acting mayor of said City of Chicago, by and with the advice and consent of the city council of said City of Chicago. That the said Edward F. Dunne was succeeded in the office of mayor of said City of Chicago by said Fred A. Busse. That the said Fred A. Busse was duly elected to the office of mayor of said City of Chicago, duly qualified, and is now the legal and acting mayor of said City of Chicago. That the said John M. Collins was succeeded in the office of superintendent of police of said City of Chicago by George M. Shippy, who was duly appointed to the office of superintendent of police of said City of Chicago by the said Fred A. Busse, the then duly elected, qualified and acting mayor of said City of Chicago, by and with the advice and consent of the city council by said City of Chicago, and is now the duly appointed and acting superintendent of police of said City of Chicago. And that since the filing of your petitioner's petition the personnel of said Civil Service Commissioners of said City of Chicago has been changed, and said Civil Service Commission now consists of Elton Lower, M. L. McKinley and H. D. Fargo.

Your petitioner further shows that the annual appropriation made by the city council of said City of Chicago, for the year 1886, and for each and every year thereafter, up to and including the year 1895,

for the payment of police officers and employes of said City of Chicago, and for other municipal purposes for each of the then respectively ensuing years, included appropriations for the payment of police patrolmen of said City of Chicago, among whom your petitioner was included as a member of said police force of said City of Chicago. And the further appropriations made by said city council of said City of Chicago, for the payment of the police patrolmen of said city, for each and every year thereafter, up to and including the year 1898, during which time your petitioner was a police patrolman in the uniformed police force of said City of Chicago, in the Classified Civil Service, and drew his pay from month to month as such police patrolman of said city for each and every month from July 1st, 1895, up to and including the month of March, 1898, and his monthly voucher, for each and every month thereof, was duly certified by said Civil Service Commissioners of said City of Chicago, as said petitioner's pay therefor became due him. And your petitioner further avers that in like manner, in the year 1899, and for each and every year thereafter, up to and including the present time, there was annual appropriation made by said city council of said City of Chicago, for the payment of police patrolmen in the uniformed police force of said City of Chicago, in the Classified Civil Service thereof, for each and every ensuing year, respectively; and that your petitioner was and is, entitled under said appropriations to be taken and carried upon said pay-rolls for each and every month of said several years, up to and including the present time, as having been lawfully

in the service of said City of Chicago, in the Classified Civil Service thereof, as a police patrolman
38 in said police department of said City of Chicago.

Wherefore your petitioner prays a writ of mandamus under the seal of said court, directed to the said City of Chicago and said Fred A. Busse, as mayor of said City of Chicago, and to George M. Shippy, as superintendent of police of said City of Chicago, and to Elton Lower, W. L. McKinley, and H. D. Fargo, as Civil Service Commissioners of said City of Chicago, and the successors in office of said respective officials, commanding them respectively, as follows: Commanding said City of Chicago, and said respective officials, other than the Civil Service Commissioners, to forthwith place the name of your petitioner upon the roster of police patrolmen, and upon the pay-rolls of police patrolmen, of said City of Chicago, to the end that your petitioner may hereafter draw the pay due your petitioner as police patrolman of said City of Chicago, from time to time, as other police patrolmen are paid.

And commanding said Civil Service Commissioners of said City of Chicago, to certify the name of your petitioner as a person entitled to pay as a police patrolman of said City of Chicago, whenever your petitioner's name shall hereafter appear as such police patrolman upon any pay-roll of police patrolmen presented to the Civil Service Commissioners for their certification; and to the end that your petitioner may hereafter draw the salary due him as a police patrolman of said City of Chicago, as other police patrolmen are paid.

And your petitioner further asks that such further order be made in the premises as justice may require.

CHARLES T. PRESTON,
Petitioner.

And afterwards, to-wit, on the 5th day of 39-43 December, A. D. 1908, the following proceedings were had and entered of record in said court, to-wit:

228,725

Charles T. Preston,

vs.

City of Chicago and Carter H. Harrison, Francis O'Neill, Superintendent of Police; Joseph Powell, Christian Meier, and Julian W. Mack, as Civil Service Commissioners of the City of Chicago.

MANDAMUS.

On motion of respondents' attorney, it is ordered that the respondents' demurrer, now on file, stand as demurrer to the petitioner's petition as amended and said cause coming on to be heard upon the demurrer to said petition as amended herein, after arguments of counsel and due deliberation by the court said demurrer is sustained and thereupon the petitioner elects to stand by his said amended petition and it is ordered by the court that said cause be and is hereby dismissed at petitioner's costs.

Therefore it is ordered by the court that the petitioner take nothing by his said suit and the defendants go hence without day and do have and recover of and from the petitioner their costs and charges in this behalf expended and have execution therefor.

SPECIFICATION OF ERRORS RELIED UPON.

First: The allegations of petitioner's petition, and amended and supplemental petition, filed in the Superior Court of Cook County, in the State of Illinois, the truth of which allegations was, by the demurrer to said amended and supplemental petition, admitted, show that the petitioner was, by the action of said defendants in error set forth in said amended and supplemental petition, and in the judgment of said Superior Court and the affirmance thereof by the final judgment of said Supreme Court of Illinois, wrongfully and without due process of law, deprived of his right to have his name carried upon the payroll as a police patrolman in the uniformed police force in the department of police of said City of Chicago, and to draw his pay as a police patrolman in said police force, in the department of police in said City of Chicago, as other police patrolmen on said police force, in the department of police, in said City of Chicago, are paid; in this, that the petitioner was, without due notice of charges preferred against him as a police patrolman in the uniformed police force of the City of Chicago, excluded from the exercise of his duties as such police patrolman and deprived of his right to be paid; and that the said action and the approval thereof by said Superior Court of

Cook County, and the affirmance thereof by the final judgment of said Supreme Court of Illinois, was and is a deprivation of petitioner's legal rights, and was and is in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and also in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States of America.

Second: The Supreme Court of the State of Illinois, by its judgment of affirmance herein of the judgment of the Superior Court of Cook County, Illinois, failed and refused to recognize or give effect to the provisions of Section 2 of Article 2 of the Constitution of the State of Illinois; and also failed and refused to recognize and enforce the rights of petitioner herein, by *affording him an opportunity to be heard in his defense;*—a right secured to him under the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Third: The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated in petitioner's said amended and supplemental petition, gave the petitioner therein no right to relief as therein and thereby prayed; which action of said Supreme Court of Illinois was, in legal effect, *a deprivation of petitioner's right to the equal protection of the law,* in violation of petitioner's right secured to him by the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fourth: The Supreme Court of the State of Illinois, by its judgment in said cause affirming the judgment of said Superior Court of Cook County, Illinois, determined and held that the facts, stated in petitioner's said petition, and amended and supplemental petition, gave the petitioner therein no right to relief as therein and thereby prayed; which action of said Supreme Court of Illinois was, in legal effect, a deprivation of petitioner's property rights, in violation of Section 2 of Article 2 of the Constitution of the State of Illinois, and in violation of petitioner's property rights secured to him by the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Fifth: The Superior Court of Cook County, Illinois, erred in sustaining the demurrer of the defendants in error to the amended and supplemental petition filed by petitioner in said Superior Court of Cook County, Illinois, on June 5, 1908, and in dismissing the petition, of the petitioner, plaintiff in error herein, at the costs of plaintiff in error herein, and in entering judgment in said cause against this petitioner, plaintiff in error herein; which resulted in abridging the privileges or immunities of a citizen of the United States, as well as of a citizen of the State of Illinois, and was and is in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States; and the Supreme Court of Illinois erred in its judgment affirming said judgment of said Superior Court.

Sixth: The Superior Court of Cook County, Illinois, erred in entering judgment in said cause of November 5, 1908, dismissing the petition of your

petitioner, plaintiff in error in said suit, and the amendments to said petition, at the costs of this plaintiff in error, and in entering judgment in said cause against petitioner, plaintiff in error therein, for costs; and the Supreme Court of the State of Illinois erred in its judgment affirming said judgment of said Superior Court.

BRIEF OF THE ARGUMENT.

I.

When federal questions are pleaded, all that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. (Transcript of Rec., pp. 19, 33; of Rec., pp. 32, 66, 67.)

Missouri, Kansas & Texas Railway Company, Plaintiff in Error, v. *John Elliott,* 184 U. S., 530; 22 Sup. Ct. Rep., 446, 448.

Detroit, Ft. W. & B. I. R. Co. v. *Osborn,* 189 U. S., 383; 23 Sup. Ct. Rep., 540.

Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581.

(a) When it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved. (Transcript of Rec., p. 25; of Rec., p. 46.)

Chicago, B. & Q. R. R. Co. v. *Chicago,* 166 U. S., ...; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581.

Lehigh v. *Green,* 193 U. S., 79; 24 Sup. Ct. Rep., 390.

II.

"Due process of law" is that which secures to every one the right to have notice of any proceeding by which his rights to life, liberty or property may be affected, notice of written charges, and written charges preferred, and to be afforded an opportunity to defend, protect and enforce his rights in an orderly proceeding adapted to the nature of the case. (Transcript of Rec., p. 18; of Rec., p. 32.)

Holden v. *Hardy,* 169 U. S., 366; 18 Sup. Ct. Rep., 383.

Davidson v. *New Orleans,* 96 U. S., 97.

III.

"Due process of law" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, protect and enforce his rights, by establishing any fact which under the law would be a protection to him or his property."

10 American and English Encyclopedia of Law, 296, 300, and cases therein cited.

Holden v. *Hardy,* 169 U. S., 366; 18 Sup. Ct. Rep., 383.

IV.

"Due process of law" implies at least a conformity with natural and inherent principles of justice, and forbids that one man's rights to property shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity to be heard in his defense."

Holden v. *Hardy*, 169 U. S., 366; 18 Sup. Ct. Rep., 383.

VI.

The prohibitions of Section 1 of Article XIV of the Amendments to the Constitution of the United States are addressed to the state. They are these: No state agency shall make or enforce a law which will abridge the privileges or immunities of citizens of the United States.

Ex parte Virginia, 100 U. S., 339, 346.

Larson v. *City of St. Paul*, 86 N. W. Rep., 459.

Mayfield v. *Moore*, 53 Ill., 428, 430.

The People v. *Barrett*, 203 Ill., 99, 108.

Massie v. *Cessna*, 239 Ill., 352, 358.

Rasmussen v. *Carbon County Commissioners*, 45 Lawyers' Reports Annotated, 295, 300.

Civil Rights Cases, 109 U. S., 3, 11.

Yick Wo v. *Hopkins*, 118 U. S., 356, 366.

Taylor v. *Beckham*, 178 U. S., 600; 20 Sup. Ct. Rep., 1009.

(a) The inhibition contained in the Fourteenth Amendment means that no agency of the state, or of the officer or agents by whom her powers are exerted, shall deny to any person within her jurisdiction the equal protection of the law.

Ex parte Virginia, 100 U. S., 339.

Taylor v. *Beckham*, 178 U. S.; 20 Sup. Ct. Rep., 1009.

VII.

"Due process of law" requires that no citizen of a state or of the United States shall be deprived of his property without due notice of charges preferred, and of any proceeding by which his property may be affected, and a right to be heard and to defend, protect and enforce his rights, by establishing any fact which under the law would be a protection to him or his property.

Taylor v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 902.

Taylor v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 1009.

Gillespie v. *The People*, 188 Ill., 176, 182.

The People v. *Barrett*, 203 Ill., 99, 108.

Massie v. *Cessna*, 239 Ill., 352, 358.

Rasmussen v. *Carbon County Commissioners*, 45 Lawyers' Reports Annotated, 295, 300.

ARGUMENT.

I.

WE HAVE CONTENDED AND STILL CONTEND THAT PETITIONER, PLAINTIFF IN ERROR HEREIN, RAISED THE FEDERAL QUESTIONS IN THE STATE COURT IN SUCH A MANNER AS TO BRING THEM TO THE ATTENTION OF THAT TRIBUNAL, AND THEREFORE THE RIGHT TO REVIEW, IN THIS COURT, EXISTS.

We are supported in our contention by authorities as follows:

In the case of *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S., 530; 22 Sup. Ct. Rep., 446, 448, at page 448, the court, speaking by Mr. Justice White, said:

> "The general rule undoubtedly is that those federal questions which are required to be set up and claimed must be so distinctly asserted below as to place it beyond question that the party bring the case here from the state court intended and did assert such a federal right in the state court. But it is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the state court *yet if the state court in deciding the case has actually considered and determined a federal question, although arising on ambiguous averments, then the federal question having been actually decided the right of this court to review obtains.* (*F. G. Oxley Stove Co.* v. *Butler County*, 166 U. S., 648, 660; 41 L. Ed., 1149, 1153; 17 Sup. Ct. Rep., 709.)
>
> "*All that is essential is that the federal ques-*

tions must be presented in the state court in such a manner as to bring them to the attention of that tribunal. (*Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581.) *And of course where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved.* * * * The *result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was not federal in its character.*"

In the case of *Lehigh* v. *Green,* 193 U. S., 79; 24 Sup. Ct. Rep., 390-391, beginning at page 390, the court, speaking by Mr. Justice Day, said:

"A motion is made to dismiss because the claim of impairment of a right secured by the Fourteenth Amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim theretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to *due process* of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Be that as it may, *the Supreme Court* of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing." (*Mallett* v. *North Carolina,* 181 U. S., 589; 45 L. Ed., 1015; 21 Sup. Ct. Rep., 730.)

II, III AND IV.

THE VALIDITY OF THE ACT OF JOSEPH KIPLEY, SUPERINTENDENT OF POLICE IN THE DEPARTMENT OF POLICE IN THE CITY OF CHICAGO, IN DROPPING THE NAME OF PETITIONER, PLAINTIFF IN ERROR HEREIN, FROM THE PAY-ROLL OF POLICE PATROLMEN IN SAID CITY, MARCH 14, 1898, WITHOUT NOTICE OF WRITTEN CHARGES PREFERRED AGAINST HIM, AND A RIGHT TO BE HEARD IN HIS DEFENSE, IS CHALLENGED UPON THE GROUND OF A VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT ABRIDGED THE PRIVILEGES AND IMMUNITIES OF A CITIZEN OF THE UNITED STATES, AS WELL AS OF THE STATE OF ILLINOIS, WITHOUT DUE PROCESS OF LAW AND DENIED TO HIM, SAID PETITIONER, THE EQUAL PROTECTION OF THE LAW.

In the case of *Holden* v. *Hardy*, 169 U. S., 366, 18 Sup. Ct. Rep., 383, 384, at page 384, the court speaking by Mr. Justice Brown, said:

> "The Fourteenth Amendment, *which was finally adopted* July 28, 1868, *largely expanded the powers of the federal courts and Congress and for the first time authorized the former to declare invalid all laws and decisions of the states abridging the rights of citizens, or denying them the benefit of Due Process of Law* * * *
>
> "In addition, the Fourteenth Amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of Due Process, or equal protection of the laws. * * *
>
> "This court has never attempted to define with precision the words 'Due Process of Law,' nor is it necessary to do so in this case. It is *sufficient to say that there are certain immutable principles of justice, which inhere in*

the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity to be heard in his defense."

(2) Due Process of Law:

Though all the preceding definitions throw much light on the meaning of due process of law, the most satisfactory definition is that it *secures to every one the right to have notice* of any proceeding by which his rights of life, liberty or property may be affected, and *to be afforded an opportunity to defend,* protect and enforce his rights in an orderly proceeding adapted to the nature of the case. (*Holden* v. *Hardy,* 169 U. S., 366; *Davidson* v. *New Orleans,* 96 U. S., 97.) * * *

(3) Due process of law requires an orderly proceeding adapted to the nature of the case, in which the *citizen has an opportunity to be heard and to defend,* protect and enforce his rights, by establishing any fact, which under the law would be a protection to him or his property.

10 American and English Encyclopedia of Law, 296, 300.

Holden v. *Hardy,* 169 U. S., 366, 391.

Holden v. *Hardy,* 18 U. S. National Reporter System, 383.

(4) Due process of law implies at least a conformity with natural and inherent principles of justice, and forbids that one man's right to property shall be taken for the benefit of another, or for the benefit of the state, without compensation, *and that no one shall be condemned in his person or property*

without an opportunity to be heard in his defense. (*Holden* v. *Hardy, supra.*)

V AND VI.

A DEPRIVATION, BY A MUNICIPALITY, OF THE RIGHT OF AN OFFICER OF THE LAW TO RECEIVE THE COMPENSATION PROVIDED BY LAW TO BE PAID TO SUCH OFFICER BY THE MUNICIPALITY, AND THE RIGHT TO RECEIVE SUCH COMPENSATION, AS OTHER OFFICERS OF THE SAME CLASS RECEIVE THEIR PAY, IS A DEPRIVATION OF THE PROPERTY RIGHTS OF SUCH OFFICER, AND IS IN VIOLATION OF SECTION 1 OF ARTICLE XIV OF THE CONSTITUTION OF THE UNITED STATES, AS WELL AS OF SECTION 2 OF ARTICLE 2 OF THE CONSTITUTION OF THE STATE OF ILLINOIS.

In the case of *Taylor* v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 902, beginning at page 902, the court, speaking by Mr. Justice Brewer, said:

> "An office to which a salary is attached, in a case in which the controversy is only as to which of two parties is entitled thereto, has been adjudged by this court, AND RIGHTFULLY, to be property within the scope of that clause of the 14th Amendment, which forbids a state to 'deprive any person of life, liberty, or property without due process of law.' In the case of *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S., 480; 23 L. Ed., 478, Kennard was appointed a Justice of the Supreme Court of Louisiana. Morgan claimed to be entitled thereto, and brought suit to settle title to the office. The Supreme Court of the state decided in favor of Morgan, and Kennard sued out a writ of error from this court on the ground that the judgment had deprived him of his office *without due process of law*, in violation of the foregoing provision of the 14th Amendment. Of course,

neither life nor liberty were involved, and the jurisdiction of this court could be sustained only on ground that the PROPERTY of Kennard was taken from him, as alleged, without due process of law. * * *

"As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction, and the motion to dismiss must be overruled."

In the case of *Taylor* v. *Beckham*, 178 U. S., 548; 20 Sup. Ct. Rep., 1009, Mr. Justice Harlan, beginning at page 1009, of 17 Sup. Ct. Rep., said:

"The first case in this court relating to this subject is, *Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S., 480; 25 L. Ed., 478. That was a writ of error brought by Kennard to review the final judgment of the Supreme Court of Louisiana declaring that he was not a member of that court. 'The case,' the report states, 'was then brought here upon the ground that the State of Louisiana acting under this law, through her judiciary, had deprived Kennard of his office without due process of law, in violation of that provision of the 14th Amendment of the Constitution of the United States which prohibits any state from depriving any person of life, liberty, or property without due process of law.' *Looking also into the printed arguments filed in that case, on behalf of the respective parties, I find that the attorney for the plaintiff in error, a lawyer of distinction, insisted that the sole question presented for determination by this court was whether the final judgment of the state court deprived Kennard of his office in violation of the above clause of the 14th Amendment. And this view was not controverted by the attorney for the defendant, also an able lawyer. The latter contended that the 14th Amendment had*

no application because in what was done no departure from the principles of due process of law had occurred. The opinion of Chief Justice Waite delivering the judgment of this court thus opens: "The *sole question presented for our consideration in this case*, as stated by counsel for plaintiff in error, *is whether the State of Louisiana, acting under the statute of January 18th, 1873, through her judiciary,* HAS DEPRIVED KENNARD OF HIS OFFICE WITHOUT DUE PROCESS OF LAW.' Of course this court had no jurisdiction to inquire whether there had been due process of law in the proceedings in the state court, *unless the office in dispute or the right to hold it was* PROPERTY *within the meaning of the 14th Amendment*, or unless Kennard's liberty was involved in his holding and discharging the duties of the office to which, as he insisted, he had been lawfully elected. *But this court took jurisdiction of the case and affirmed the judgment of the Supreme Court of Louisiana upon the ground that the requirement in the 14th Amendment of due process of law had not been violated.* IF, IN THE JUDGMENT OF THIS COURT, AS CONSTITUTED WHEN THE *Kennard* CASE WAS DECIDED, AN OFFICE HELD UNDER THE AUTHORITY OF A STATE WAS NOT "PROPERTY" WITHIN THE MEANING OF THE 14TH AMENDMENT, *the case would have been disposed of upon the ground that no Federal right had been or could have been violated*, and the court would not have entered upon the inquiry as to what, under the 14th Amendment, constituted due process of law in a case of which—according to the principles this day announced—it had no jurisdiction.

"In *Foster* v. *Kansas ex rel. Johnston*, 112 U. S., 201; 28 L. Ed., 626; 5 Sup. Ct., 8, 97,—which was a writ of error to review the final judgment of the Supreme Court of Kansas,—THE SOLE ISSUE WAS AS TO THE RIGHT OF FOSTER

TO HOLD THE OFFICE OF COUNTY ATTORNEY, the defendant in error moved to *dismiss the writ for want of jurisdiction in this court, and accompanied the motion with a motion to affirm.* This court refused to dismiss the case, and, referring to *Kennard* v. *Louisiana,* affirmed the judgment upon the ground that there had been, in its opinion, no departure from the process of law in the proceedings to remove Foster. *It never occurred to the court, nor to any attorney in the case, that the 14th Amendment did not embrace the case of a state office from which the incumbent was removed without due process of law.*

"If such an *office* was not deemed PROPERTY within the meaning of the amendment, *that was the end of the case here.* But the court took jurisdiction and disposed of the case upon the ground that the requirement in the Federal Constitution of due process of law had been observed. * * *

"*When the 14th Amendment forbade any state from depriving any person of life, liberty, or property without due process of law, I had supposed that the intention of the people of the United States was to prevent the deprivation of any legal right in violation of the fundamental guarantees inhering in due process of law. The prohibition of that Amendment, as we have often said, applied to all the instrumentalities of the state, to its legislature, executive, and judicial authorities; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that* 'WHOEVER BY VIRTUE OF PUBLIC POSITION UNDER A STATE GOVERNMENT DEPRIVES ANOTHER OF PROPERTY, LIFE, OR LIBERTY WITHOUT DUE PROCESS OF LAW, OR DENIES OR TAKES AWAY THE EQUAL PROTECTION OF THE LAW, *violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power,*

his act is that of the state. THIS MUST BE SO, OR (*as we have often said*) THE CONSTITUTIONAL PROHIBITION HAS NO MEANING. *The state has clothed one of its agents with power to* ANNUL OR EVADE IT.' (*Ex parte Virginia,* 100 U. S., 339; 25 L. Ed., 676; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581; *Scott* v. *McNeal,* 154 U. S., 34; 38 L. Ed., 869; 14 Sup. Ct. Rep., 1108.) Alluding to a contention that the party—a railroad company—which invoked the 14th Amendment for the protection of its property had the benefit of due process of law in the proceeding against it, *because it had due notice of those proceedings and was admitted to appear and make defense,* this court has also said: '*But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the* FULLEST OPPORTUNITY TO BE HEARD, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, and not to form.' (*Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 226; L. Ed., 979; 17 Sup. Ct. Rep., 581.) Again, in another case: 'Though the law itself be fair on its face and impartial in appearance, *yet if it is applied and administered by public authority with an evil eye and an unequal hand it is still within the prohibition of the Constitution.*' (*Yick Wo* v. *Hopkins,* 118 U. S., 373; 30 L. Ed., 227; 6 Sup. Ct. Rep., 1064.) See, also: *Henderson* v. *New York,* 92 U. S., 259, sub. nom.; *Henderson* v. *Wickham,* 23 L. Ed., 543; *Chy Lung* v. *Freeman,* 92 U. S., 275; 23 L. Ed., 550; *Neal* v. *Delaware,* 103 U. S., 370; 26 L. Ed., 567; *Soon Hing* v. *Crowley,* 115 U. S., 703; 28 L. Ed., 1145; 5 Sup. Ct. Rep., 730.

"It is said that the courts cannot, in any case, go behind the final action of the Legislature to ascertain whether that which was done was consistent with the rights claimed under the Federal Constitution. If this be true then it is in the power of the state Legislature to override the supreme law of the land. As long ago as *Davidson* v. *New Orleans*, 96 U. S., 97, 102; 24 L. Ed., 616, 618, this court, speaking by Mr. Justice Miller, said: *'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the form of state legislation.'*

"More recently we have said: 'The idea that any Legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. *The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation.* The function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.' (*Smith* v. *Ames*, 169 U. S., 466; 42 L. Ed., 819; 18 Sup. Ct. Rep., 418.) *I had supposed that the principles announced in the cases above cited were firmly established in the jurisprudence of this court and that, if applied, they would serve to* PROTECT EVERY RIGHT that could be brought within judicial cognizance

against deprivation in violation of due process of law. * * *

"*I stand by the former rulings of this court in the cases above cited. I am of the opinion that, equally with tangible property that may be bought and sold in the market,* AN OFFICE—CERTAINLY ONE ESTABLISHED BY THE CONSTITUTION OF A STATE, *to which office a salary is attached, and which cannot be abolished at the will of the Legislature—is, in the highest sense,* PROPERTY *of which the incumbent cannot be deprived* ARBITRARILY *in* DISREGARD *of due process of law;* that is, as the court said in *Kennard* v. *Louisiana*, in regard to the rules and forms which have been established for the protection of private rights. APART FROM EVERY OTHER CONSIDERATION THE RIGHT TO RECEIVE AND ENJOY THE SALARY ATTACHED TO AN OFFICE IS A RIGHT OF PROPERTY. AND A RIGHT OF PROPERTY SHOULD BE DEEMED PROPERTY, *unless we mean to play with words, and regard form rather than substance.*

"I go farther, the liberty of which the 14th Amendment forbids a state from depriving any one without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words 'Life, liberty, or property,' in the 14th Amendment, should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of 'due process of law.' * * *

"What more directly involves the liberty of a citizen than to be able to enter upon the discharge of the duties of an office to which he has been lawfully elected by his fellow-citizens? What more certainly infringes upon his liberty than for the Legislature of the state, by merely arbitrary action, in violation of the rules and form required by due process of law, to take from him the right to discharge the public du-

ties imposed upon him by his fellow-citizens in accordance with law? Can it be said that the right to pursue a lawful calling is a part of one's liberty secured by the 14th Amendment against illegal deprivation; and yet the right to exercise an office to which one has been elected and into which he has been lawfully inducted is no part of the incumbent's liberty, and may be disregarded by the mere edict of a legislative body, sitting under a constitution which declares that absolute arbitrary power exists nowhere in a republic?"

In the case of *Massie* v. *Cessna*, 239 Ill., 352, 358, the court said:

> "The appellant insists that the statute in question violates Section 2 of Article 2 of the Constitution of the state, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' This is the only question for consideration. * * *
>
> "The right to labor for and to render services to another, and the right to dispose of the compensation to be received for so doing are *property rights* within the meaning of the language just quoted from the constitution. (*Frorer* v. *People*, 141 Ill., 171; *Braceville Coal Co.* v. *People*, 147 Ill., 66; *Mallin* v. *Wenham*, 209 *id.*, 252.)"

VII.

WE CONTEND THAT THE SO-CALLED DISCHARGE OF PETITIONER, PLAINTIFF IN ERROR HEREIN, WAS AND IS IN VIOLATION OF SECTION 2 OF ARTICLE 2 OF THE CONSTITUTION OF THE STATE OF ILLINOIS, 1870, AND OF SECTION 1 OF ARTICLE XIV OF THE CONSTITUTION OF THE UNITED STATES, IN THAT SECTION 735 OF THE ORDINANCE OF 1881, TRANSCRIPT OF RECORD, P. 12, OF RECORD, P. 22, WHICH READS AS FOLLOWS: "SAID SUPERINTENDENT SHALL HAVE THE POWER TO REMOVE FROM THE POLICE FORCE ANY POLICE PATROLMAN AT HIS PLEASURE, AND, WITH THE CONCURRENCE OF THE MAYOR, HE MAY REDUCE IN RANK ANY OFFICER OR MEMBER OF SAID DEPARTMENT," CONFERRED ARBITRARY POWERS UPON THE SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO, SUCH AUTHORITY BEING BEYOND THE POWER OF THE LEGISLATURE OF THE STATE OF ILLINOIS, TO CONFER SUCH POWER UPON THE MUNICIPAL AUTHORITIES OF SAID CITY.

In the case of *Yick Wo.* v. *Hopkins,* 118 U. S., 356, 366, 373, beginning at page 366, the court, speaking by Mr. Justice Matthews, said:

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a *naked and arbitrary power* to give or withhold consent, not only as to place but as to person. * * * The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they were applied by the public authorities charged with their administration, *and thus representing the*

state itself with a mind so unequal and oppressive as to *amount to a practical denial* by the state of that equal protection of the law which is secured to the petitioners, as to all other persons."

In conclusion we ask that this case may be reversed and remanded that a hearing, in accordance with the law of the land may be had.

A. B. CHILCOAT,
Attorney for Plaintiff in Error

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

CHARLES T. PRESTON,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO et al.,
Defendants in Error.
No. 495.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.
FILED DECEMBER 30, 1910.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

NOTICE, MOTION, STATEMENT, BRIEF AND ARGUMENT.

JOHN W. BECKWITH,
ASSISTANT CORPORATION COUNSEL,
ATTORNEY FOR DEFENDANTS IN ERROR.

WILLIAM H. SEXTON,
CORPORATION COUNSEL,
OF COUNSEL.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

CHARLES T. PRESTON, *Plaintiff in Error,*
vs.
THE CITY OF CHICAGO ET AL., *Defendants in Error.*
No. 474.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED DECEMBER 30, 1910.

To A. B. CHILCOAT, ESQ.,
Attorney for Plaintiff in Error.

PLEASE TAKE NOTICE, That on Monday, June 3, 1912, at the opening of said court, or as soon thereafter as counsel can be heard, the motion, a copy of which is hereto attached, will be submitted to said court for its decision thereon. Annexed hereto is a copy of the statement of the matter involved and brief and argument which will be submitted with said motion, in support thereof.

. . . . . ,
Assistant Corporation Counsel,
Attorney for Defendant in Error.

Received a copy of the above notice this .....
day of May, A. D. 1912.

.....,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

CHARLES T. PRESTON,
Plaintiff in Error,
vs.
THE CITY OF CHICAGO ET AL.,
Defendants in Error.
No. 474.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS. FILED DECEMBER 30, 1910.

MOTION TO DISMISS WRIT OF ERROR OR AFFIRM JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

Now come the defendants in error in the above entitled cause, by their attorney, and move the court to dismiss said writ of error, under rule 4 of the rules of this court, promulgated December 22, 1911, or, in the alternative, to affirm the judgment of the Supreme Court of the State of Illinois in accordance with the provisions of rule 5 of the rules promulgated December 22, 1911, on the ground—

First. That there is no such federal issue involved in said cause as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error seeking to raise a federal issue in this cause are so frivolous as not to need further argument.

Received a copy of the above notice this ..... day of May, A. D. 1912.

....,
Counsel for Plaintiff in Error.

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First. That there is no such federal issue involved in said cause as to give this court jurisdiction; and

Second. That the contentions of plaintiff in error seeking to raise a federal issue in this cause are so frivolous as not to need further argument.

STATEMENT.

This is a writ of error to the Supreme Court of the State of Illinois to review the judgment of that court affirming the judgment of the Superior Court of Cook County, denying a writ of mandamus to the relator in this cause. The judgment was rendered in the Superior Court of Cook County after a demurrer of defendants to an amended and supplemental petition had been sustained.

In the petition it is averred, *inter alia*, that petitioner became a police patrolman of the City of Chicago June 1, 1886, and continued as such until March 4, 1898, on which date he was discharged by the General Superintendent of Police without charges having been preferred against him and without any trial upon any charges of any nature against him, and without the written concurrence of the then Mayor of the City. (Rec., 18.) These allegations are made upon information and belief.

The original petition was filed March 11, 1903. The alleged discharge of relator from the police force was March 14, 1898, leaving a period of five years lacking three days between the dropping of petitioner's name from the payroll and the filing of the petition. On December 2, 1908, the amended petition was filed. The petition is voluminous and fully set forth in the record (pages 8 to 22, inclusive), but the above statement, we think, contains sufficient for the purposes of this motion.

The Supreme Court of Illinois in affirming the judgment below did so upon four grounds (Rec., 25):

First. That the petitioner, a police patrolman, at the time of classification of places of employment by the Civil Service Commission of the City of Chicago, did not thereby become an officer of the classified service and entitled to the protection conferred by that act against removal.

Second. That there was no such office as that of police patrolman in the City of Chicago at the time of the filing of the amended and supplemental petition.

Third. That the removal of petitioner without notice and upon written charges and without an opportunity to be heard was not in violation of Section 2 of Article A of the State Constitution and Section 1 of the Fourteenth Amendment of the Federal Constitution.

Fourth. That the defense of laches raised in this case was an adequate and complete defense to the action.

POINTS AND AUTHORITIES.

Ia.

IF THE DECISION OF THE STATE COURT IS UPON GROUNDS BROAD ENOUGH TO SUPPORT THE JUDGMENT INDEPENDENT OF ANY FEDERAL QUESTION, THERE IS NO FEDERAL ISSUE INVOLVED IN THE CASE SO AS TO GIVE THIS COURT JURISDICTION AND IT WILL NOT ENTERTAIN A WRIT OF ERROR.

Rutland Railroad Co. v. *Central Vermont R. Co.*, 159 U. S. 630.

Klinger v. *Missouri*, 13 Wall. (U. S.) 263.

Capital National Bank v. *Cadiz First National Bank*, 172 U. S. 425.

Harrison v. *Morton*, 171 U. S. 38.

Pierce v. *Somerset R. Co.*, 171 U. S. 641.

Wade v. *Lawder*, 165 U. S. 624.

Bacon v. *Texas*, 163 U. S. 207.

Seneca Nation v. *Christy*, 162 U. S. 283.

Gillis v. *Stinchfield*, 159 U. S. 658.

Ib.

THIS COURT WILL NOT DISTURB THE JUDGMENT OF A STATE COURT RENDERED UPON THE QUESTION OF LACHES.

Moran v. *Horsky*, 178 U. S. 205.

Pittsburgh, etc., Iron Co. v. *Cleveland Iron Min. Co.*, 178 U. S. 270.

Marrow v. *Brinkley*, 129 U. S. 178.

Rutland R. Co. v. *Central Vermont R. Co.*, 159 U. S. 630.

II.

THE OPINION OF THE STATE COURT IS TO BE LOOKED TO FOR THE PURPOSE OF SHOWING WHETHER A PARTICULAR QUESTION WAS CONSIDERED AND DECIDED IN DETERMINING WHETHER THIS COURT MAY TAKE JURISDICTION.

San Jose Land, etc., Co. v. *San Jose Ranch Co.*, 189 U. S. 180.

Mallett v. *North Carolina*, 181 U. S. 589.

Egan v. *Hart*, 165 U. S. 188.

Dibble v. *Bellingham Bay Land Co.*, 163 U. S. 63.

Sayward v. *Denny*, 158 U. S. 180.

Kreiger v. *Shelby R. Co.*, 125 U. S. 39.

Crescent City Live Stock Co. v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141.

Philadelphia Fire Ass'n v. *New York*, 119 U. S. 110.

Gross v. *U. S.*, 108 U. S. 477.

Crossley v. *New Orleans*, 108 U. S. 105.

Murdock v. *Memphis*, 20 Wall. (U. S.) 590.

Delmas v. *Merchants' Ins. Co.*, 14 Wall. (U. S.) 661.

III.

WHILE THE ASCERTAINMENT OF THE EXISTENCE OF DUE PROCESS OF LAW IS THE FINAL PROVINCE OF THIS COURT, NEVERTHELESS, WHERE THE STATE COURT HAS DECIDED THAT A PARTICULAR FORMALITY WAS OR WAS NOT ESSENTIAL UNDER THE STATE STATUTE, SUCH DECISION PRESENTS NO FEDERAL QUESTION.

Castillo v. *McConnico*, 168 U. S. 674.

Pittsburgh, etc., R. Co. v. *Backus*, 154 U. S. 421.

Kentucky R. Tax Cases, 115 U. S. 322.

Davidson v. *New Orleans*, 96 U. S. 97.

Baltimore Traction Co. v. *Baltimore Belt R. C.*, 151 U. S. 137.

Marchant v. *Pennsylvania R. Co.*, 153 U. S. 380.

IV.

PLAINTIFF IN ERROR HAS NO PROPERTY RIGHTS IN THE EMOLUMENTS OF THE POSITION OR OFFICE OF POLICE PATROLMAN, AND, THEREFORE, HAS SUFFERED NO DEPRIVATION THEREOF IN VIOLATION OF THE FEDERAL CONSTITUTIONAL GUARANTIES.

People v. *Kipley*, 171 Ill. 44, 71.

Donahue v. *County of Will*, 100 Ill. 94.

State v. *Hawkins*, 44 Ohio St. 98.

V.

NOR IS PLAINTIFF IN ERROR DEPRIVED OF HIS PROPERTY WITHOUT DUE PROCESS THROUGH BEING RENDERED INELIGIBLE FOR A POLICE PENSION BY THE CITY'S ACTION, SINCE THERE IS NO PROPERTY RIGHT IN A PENSION WHICH IS MERELY A LARGESS OR GRATUITY.

Morgan v. *People*, 216 Ill. 437, 449.

Walton v. *Cotton*, 19 How. 355.

Frisbie v. *U. S.*, 157 U. S. 160.

26 Am. & Eng. Ency. of Law, (2nd Ed.) 658.

ARGUMENT.

PLAINTIFF IN ERROR IS ONE OF A CLASS CONSISTING OF FORMER POLICE PATROLMEN OF THE CITY OF CHICAGO, CONCERNING THE LEGALITY OF WHOSE REMOVAL FROM SUCH POSITION THE COURTS OF ILLINOIS HAVE ANNOUNCED DECISION IN THE FOLLOWING CASES:

Stott v. *City of Chicago*, 205 Ill. 281.
McNeill v. *City of Chicago*, 212 *id.* 481.
Kenneally v. *City of Chicago*, 220 *id.* 485.
Schultheis v. *City of Chicago*, 240 *id.* 167.
People v. *City of Chicago*, 242 *id.* 561.
Preston v. *City*, 246 *id.* 26.
Gersch v. *City of Chicago*, 250 *id.* 551.

The last named cause is now pending in this court.

In all of these cases the right of the petitioners to become reinstated upon the police force of the City of Chicago has been denied by the highest tribunal of this state.

In all these cases contentions similar to those in the one at bar have been raised by the respective appellants or plaintiffs in error.

In the case of Kenneally and Schultheis, *supra*, and the one at bar various contentions were raised by appellants in the State Supreme Court as ground for the reversal of the judgment of the lower court, and the State Supreme Court not only decided these contentions adversely to the petitioners, but also decided that in each of said cases the petitioners had

been guilty of such *laches* as to defeat their rights, if any they had.

In this case the petitioner slept upon such rights as he might have had from March 14, 1898, until March 11, 1903, a period of five years lacking three days.

Concerning such apparent acquiescence on the part of one removed from the police force, the State Supreme Court say in *Kennedy* v. *City*, *supra* (p. 502):

> "In addition to what has been said, it is clear that the appellant has been guilty of laches in not sooner presenting his application for restoration to the position, which he claims. 'The granting of the writ of mandamus is discretionary with the court in view of all the existing facts, and with due regard to the consequences which may result.' (*People* v. *Ketchum*, 72 Ill. 212; *People* v. *Board of Supervisors of Adams County*, 185 *id.* 288.) In *People ex rel.* v. *Board of Supervisors*, 185 Ill. 288, we said (p. 293): Courts, in granting or refusing writs of mandamus, exercise judicial discretion, and are governed by what seems necessary and proper to be done in the particular instance for the attainment of justice. Courts, in the exercise of wise, judicial discretion, may, in view of the consequences attendant upon the issuing of a writ of mandamus, refuse the writ, though the petitioner has a clear legal right for which mandamus is an appropriate remedy.' It has been said that 'the writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will fail to have a beneficial effect, it will be denied.' (*Cristman* v. *Peck*, 90 Ill. 150; *People* v. *Lieb*, 85 *id.* 484; *Illinois Watch Case Co.* v. *Pearson*, 140 *id.* 423.) It has also been held that the writ of mandamus, being a discretionary

writ, will only issue in a case where it appears by law that it ought to issue, and the court will not order it in doubtful cases. (*Commissioners of Highways* v. *People*, 4 Ill. App. 391.) In *People ex rel.* v. *Davis*, 93 Ill. 133, we said: 'The court exercises a discretion in granting or refusing the writ, and, if the right be doubtful, it will be refused.' It has been held that the writ will be refused where the granting of it will disarrange the public service. (*People ex rel.* v. *Palmer*, 38 N. Y. Supp. 652.)"

In the case of *Schultheis* v. *City of Chicago*, 240 Ill. 167, petitioner had delayed bringing his suit for the identical period of time involved in the present suit, namely, five years lacking three days. In discussing the question of laches, the court say (p. 169):

"It is urged in support of the demurrer that it appears from the petition as finally amended that the petitioner was guilty of such laches in bringing his action as barred any right that he might otherwise have had, and this contention finds support in the case of *Kenneally* v. *City of Chicago*, 220 Ill. 485, which is squarely in point. Kenneally and Schultheis were both appointed policemen of the city of Chicago in 1888. The names of both were dropped from the police pay-roll on the same day, March 14, 1898. Kenneally filed his original petition for mandamus on January 24, 1900. Schultheis filed his original petition for mandamus on March 11, 1903. Kenneally filed his amended petition, to which a demurrer was sustained and by which he elected to abide, on December 19, 1904. In the Kenneally case we held that the appellant had been guilty of such laches as authorized the trial court to sustain the demurrer to the petition, and if that case be followed on the question of laches the judgment in the case at bar must be affirmed, as no attempt is made by the petition-

er's pleading to show any excuse for the delay. Schultheis is represented by the same counsel who represented Kenneally, and they argue that the earlier case is wrong. We have upon their insistence again examined the questions involved and deem it necessary to notice in this opinion but one criticism of the former case. It is asserted with great vigor that laches cannot be relied upon as a defense in any suit at law, and it is said, to quote the language of counsel, 'laches is a defense which may be interposed in a court of equity only.'

This is a mistake. Cases are common in this court in which laches has been regarded as affording a defense in proceedings in *quo warranto* and in proceedings in *certiorari*, both of which are at law. *Clark* v. *City of Chicago*, 233 Ill. 113; *City of Chicago* v. *Condell*, 224 *id.* 595; *People* v. *Hanker*, 197 *id.* 409; *Trustees of Schools* v. *School Directors*, 88 *id.* 100; *People* v. *Schnepp*, 179 *id.* 305.

In the case cited from the 233d we held that a member of the Chicago police force claiming to have been wrongfully removed would be barred by laches from his right to have the record of the civil service commissioners reviewed by *certiorari* if he delayed more than six months in beginning his suit unless the delay was satisfactorily explained by the petition for the writ. We are satisfied that we should adhere to the Kenneally case."

The Supreme Court of the State in the present case say (Rec., 25):

"The material and vital questions raised on this record are: * * *

Fourth, that the writ of mandamus is a writ of right; that the time limited for commencing the action is five years; that nothing short of that time can be urged or considered against the right to maintain it; that a defense based upon a lapse of time must be pleaded and that laches

> is not applicable. We held otherwise in *Kennedy v. City of Chicago, supra*, and *Schultheis v. City of Chicago*, 240 Ill. 167. We could not reverse the judgment in this case without overruling our decisions in those cases, and we are not convinced that we would be justified by the law in overruling them.

It thus appears that the question of laches has not only been determined against the contentions of plaintiff in error in the State Court in the present case, but that the well settled law of Illinois upon this question was followed in that decision, and that in the Schultheis case, *supra*, the exact period of time during which present plaintiff in error neglected to assert his rights in this case was there considered by the court.

In *Rutland Railroad Co. v. Central Vermont R. Co.*, 159 U. S. 630, the decision of the state court, to which the writ of error ran from this court, did not proceed exclusively on the decision of the federal question, but also upon questions of general law. The state court decreed that the Rutland Company, in a court of equity, could not have relief for what, by its own laches, it had suffered to be done, professedly in its behalf, by the Central Vermont Company. Beside this non-federal question, rights under the federal constitution were also decided by the court in its decree.

Concerning the non-federal question, this court say (p. 640):

> "These grounds involved no Federal question, and were broad enough to support the judgment, without regard to the question whether the provision of the statute, under which the Central Vermont Company paid the

taxes and deducted them from the rent, was or was not constitutional.

Such being the case, the conclusion is inevitable, that this court has no jurisdiction to review the decision of the state court.

It is well settled, by a long series of decisions of this court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question. *Murdock* v. *Memphis*, 20 Wall. 590; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Beaupre* v. *Noyes*, 138 U. S. 397; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; *Hammond* v. *Johnston*, 142 U. S. 73; *Tyler* v. *Cass County*, 142 U. S. 288; *Delaware Co.* v. *Reabold*, 142 U. S. 636; *Eustis* v. *Bolles*, 150 U. S. 361; in the last two of which many other cases to the same effect are cited."

In the case at bar three of the four questions decided by the state court are questions of general law. The third question alone is claimed to be a federal one. (Rec., 25.)

In *Marrow* v. *Brinkley*, 129 U. S. 178, the question of laches was raised in the state court as well as the federal question. The state court decided the case upon the question of laches. This court say (p. 181):

"Unless it appears affirmatively that the decision of a Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this court has no jurisdiction of a writ of error to a state court. In this case the judgment as rendered involved the decision of no

such question, and none such was actually decided."

In *Moran* v. *Horsky*, 178 U. S. 205, the Supreme Court of the state affirmed the decree of the trial court primarily on the ground of laches. The court say (p. 207):

> "If this be an independent ground, involving no question under the Federal statutes, the decision of the Supreme Court must be sustained and the writ of error dismissed. *Eustis* v. *Bolles*, 150 U. S. 361. * * *
>
> We conclude, therefore, that the defense of laches, which in its nature is a defense conceding the existence of an earlier legal or equitable right, and affirming that the delay in enforcing it is sufficient to deny relief, is the assertion of an independent defense. It proceeds upon the concession that there was under the laws of the United States a prior right, and, conceding that, says that the delay in respect to its assertion prevents its present recognition. For these reasons we are of the opinion that the decision of the Supreme Court of Montana was based upon an independent non-Federal question, one broad enough to sustain its judgment, and the writ of error is dismissed."

In *Pittsburgh, etc., I. Co.* v. *Cleveland I. Min. Co.*, 178 U. S. 270, a motion was made in this court to dismiss for want of jurisdiction on the ground that no federal question was raised in the state court, or, if one was raised, the decision of the state court rested on a question not Federal, which was sufficient to sustain the judgment. The court say (p. 279):

> "It is manifest that the Supreme Court rested its decision on the grounds (1) that the pumping contract was a settlement of boundaries between the contestants; (2) that what was done

and expended under it worked an estoppel against the plaintiff; (3) laches of the plaintiff, in asserting its claim whereby the *status quo* could not be restored.

It requires no argument to demonstrate that neither of these grounds involves a Federal question. But plaintiff in error contends that they were all made to depend upon a Federal question, which the court erroneously decided, and, therefore, that they necessarily involve such question. * * *

"But whether plaintiff did or did not own land of Section 10 which could be or could not be measured by metes and bounds; whatever its rights and the rights of the other parties were, they could be settled by agreement, and could be made the foundation of business transactions and enterprises. The Supreme Court determined they were so made and could be so made under the laws of Michigan.

But again, and whatever the error in that conclusion (we do not assert there was any), the court decided, as an independent ground of estoppel, that plaintiff was guilty of laches, and that was sufficient to sustain its judgment.

The case must, therefore, be dismissed for want of jurisdiction, and it is so ordered."

In *Harrison* v. *Morton*, 171 U. S. 38, the court say (p. 46):

"It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery. This contention was clearly presented by defendant's prayers, and they contained the only rulings urged upon the court in that way, that

is, in the nature of instructions. They were given and the verdict was generally for the defendant. It is, therefore, natural to presume that the verdict was rendered on account of them and on the ground urged by them. The ruling of the court granting them was sustained by the Supreme Court of the state. It affirmed the ruling as correct in law and as supported by competent testimony. The Supreme Court, it is true, passed on other grounds, passed on the one which it is claimed involved a Federal question, and decided it adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in *Eustis* v. *Bolles*, 150 U. S. 361. It is sufficient to announce the rule pronounced in that case:

'It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635.

'It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.' See also *Wade* v. *Lander*, 165 U. S. 624.

The writ of error must therefore be dismissed."

It is perfectly apparent from the decision of the Supreme Court of Illinois in the above case that the plaintiff in error was held to be estopped upon the ground of laches irrespective and independent of any other point presented to the Supreme Court. If all the other points had been decided favorably to his contentions, he would still have been barred by the decision upon the question of laches.

The cause here is not impressed with a federal question sufficient to retain the writ of error in this court against the motion to dismiss.

In *Capital National Bank* v. *First National Bank of Cadiz*, 172 U. S. 425, it is said (p. 430):

> "Moreover, even though a Federal question may have been raised and decided, yet if a question, not Federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment."

In *Castillo* v. *McConnico*, 168 U. S. 674, the court say (p. 679):

> "To decide the issue as to jurisdiction, we will at the outset ascertain whether a Federal question was necessarily involved in the decision of the State Supreme Court. Even though it be that a Federal controversy was decided, nevertheless if the questions of a purely state character, upon which the Supreme Court of Louisiana passed, are completely adequate to sustain the decree by that court rendered, wholly independent of the Federal question, it will result that no Federal issue is presented for review. *Egan* v. *Hart*, 165 U. S. 188, 191; *Powell* v. *Brunswick County*, 150 U. S. 433, 441, and authorities referred to in both of the foregoing cases."

CONCLUSION.

We will not attempt to burden the court with a further argument or detailed citation from the other cases cited in our brief. The decision of the State Supreme Court in the case at bar decides three questions involving no federal issues, one of which is the question of laches. It also decides that the action of the lower court was not in violation of relator's constitutional guaranties, and we have put our motion in the alternative for the reason that we conceive that either a dismissal of the writ of error would be proper under rule 4, or an affirmance of the judgment of the State Supreme Court may be ordered by this court under rule 5.

The whole contention of the plaintiff in error appears to us distinctly frivolous so far as the presentation of any legitimate federal question is concerned. With respect to the procedure in this case, we are not concerned whether the court dismisses the appeal or affirms the judgment below.

We, therefore, ask that if the court approve the contentions herein advanced, it either dismiss the writ of error or affirm the judgment below.

Respectfully submitted,

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PRESTON *v.* CITY OF CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 195. Submitted December 16, 1912.—Decided January 6, 1913.

Whether a state officer is within the classified service and not subject to removal under the Civil Service Act of the State is a matter for the state court to determine, and its ruling is binding upon this court and presents no Federal question. *Taylor* v. *Beckham*, 178 U. S. 548.

Where the judgment of the state court rests upon non-Federal questions sufficient to support it, such as laches and long delay, this court cannot review the judgment upon the ground that a Federal question also exists. *Moran* v. *Horsky*, 178 U. S. 205.

In a proceeding specifically for mandamus to restore petitioner to a state office over which this court has no jurisdiction, it cannot con-

sider any rights which petitioner may have in a fund of which he may be deprived without due process of law, and the judgment dismissing for want of jurisdiction does not conclude his rights in that respect. Writ of error to review 246 Illinois, 26, dismissed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court by writ of error, are stated in the opinion.

Mr. John W. Beckwith and *Mr. W. H. Sexton* for the defendants in error, in support of motion to dismiss or affirm:

If the decision of the state court is upon grounds broad enough to support the judgment independent of any Federal question, there is no Federal issue involved in the case so as to give this court jurisdiction and it will not entertain a writ of error. *Rutland Railroad Co.* v. *Central Vermont R. R. Co.*, 159 U. S. 630; *Moran* v. *Horsky*, 178 U. S. 205; *Pittsburgh Iron Co.* v. *Cleveland Iron Min. Co.*, 178 U. S. 270; *Marrow* v. *Brinkley*, 129 U. S. 178; *Castillo* v. *McConnico*, 168 U. S. 674; *Klinger* v. *Missouri*, 13 Wall. 263; *Capital National Bank* v. *Cadiz Nat. Bank*, 172 U. S. 425; *Harrison* v. *Morton*, 171 U. S. 38; *Pierce* v. *Somerset R. Co.*, 171 U. S. 641; *Wade* v. *Lawder*, 165 U. S. 624; *Bacon* v. *Texas*, 163 U. S. 207; *Seneca Nation* v. *Christy*, 162 U. S. 283; *Gillis* v. *Stinchfield*, 159 U. S. 658.

Plaintiff in error has no property rights in the emoluments of the position or office of police patrolman, and, therefore, has suffered no deprivation thereof in violation of the Federal constitutional guaranties. *People* v. *Kipley*, 171 Illinois, 44, 71; *Donahue* v. *County of Will*, 100 Illinois, 94; *State* v. *Hawkins*, 44 Oh. St. 98.

Nor is plaintiff in error deprived of his property without due process through being rendered ineligible for a police pension by the city's action, since there is no property right in a pension, which is merely a largess or gratuity.

Morgan v. *People*, 216 Illinois, 437, 449; *Walton* v. *Cotton*, 19 How. 355; *Frisbie* v. *United States*, 157 U. S. 160; 26 Am. & Eng. Ency. of Law (2d ed.), 658.

Mr. Allen B. Chilcoat and *Mr. Stephen A. Day* for the plaintiff in error, in opposition thereto:

A motion to dismiss will be denied where a claim of Federal right under the Constitution of the United States has been specially set up and denied by the decision of the state court, whether such question appears to have been expressly passed upon or must have been denied by the state court in reaching its conclusion. *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 30; *Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254; *Detroit &c. Ry.* v. *Osborn*, 189 U. S. 383; *Schlemmer* v. *Buffalo, Roch. & P. Ry.*, 205 U. S. 1, 11; *T. H. & Indianapolis R. R. Co.* v. *Indiana*, 194 U. S. 579; *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S. 683, 697; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579; *Bohanan* v. *Nebraska*, 118 U. S. 231; *West Chicago R. R.* v. *Chicago*, 201 U. S. 506, 519.

Memorandum opinion, by direction of the court, by Mr. Chief Justice White.

Upon the assertion that he had been wrongfully dropped "from the pay roll of the policemen of the City of Chicago," plaintiff in error commenced proceedings in *mandamus* in the state court to compel the placing of his name upon the said pay rolls to the end that he might thereafter draw the pay alleged to be due him as a police patrolman "as the other police patrolmen in said city of Chicago are paid." This writ of error is prosecuted to a judgment of the Supreme Court of Illinois (246 Illinois, 26), affirming a judgment sustaining a demurrer to the petition in *mandamus* and denying the writ.

Among other contentions made by the plaintiff in error

and passed upon by the Supreme Court of Illinois was one to the effect that he had become an officer of the classified service and entitled to the protection against removal conferred by an act styled the Civil Service Act and that hence his removal from office without written charges preferred against him and without notice and an opportunity to be heard amounted to a denial of due process of law within the purview of the state constitution and of the Fourteenth Amendment to the Constitution of the United States. But the court below held these claims not maintainable on the ground that upon a proper construction of the state statutes the petitioner was not in the classified service and was subject to removal. This ruling is binding upon us and presents no Federal question. *Taylor* v. *Beckham*, 178 U. S. 548. Even, however, if we were at liberty to disregard the action of the state court and attribute to the plaintiff in error the status claimed by him, as in addition the court below held that the right to the relief prayed was in any event barred by long delay and laches, this would be sufficient to prevent us from reviewing the alleged Federal question. *Moran* v. *Horsky*, 178 U. S. 205, 207.

It is strenuously insisted in argument that the plaintiff in error was entitled to participate in a police pension fund to which he had contributed from his wages for a long period of time, and therefore to remove him was additionally to deprive him of property without due process of law, in violation of the Fourteenth Amendment. But the specific relief prayed was a writ of *mandamus* to restore plaintiff in error to the pay rolls as a policeman. What if any rights in the pension fund referred to were protected by the Constitution of the United States we therefore may not here consider, and that question from a Federal point of view is not concluded by the judgment dismissing the writ of error which we shall enter.

Writ of error dismissed.